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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

LEAGUE OF WOMEN VOTERS OF MICHIGAN, AMERICAN CITIZENS FOR JUSTICE, APIA VOTE - MICHIGAN, DETROIT ACTION, LGBT DETROIT, NORTH FLINT NEIGHBORHOOD ACTION COUNCIL, RISING VOICES, KENT BLOHM, CATHY BROCKINGTON, DENISE HARTSOUGH, DONNA HORNBERGER, GILDA JACOBS, JUDY KARANDJEFF, MARGARET LEARY, ATHENA MCKAY, CHRISTINE PAWLAK, KATHERINE PRIMEAU, RONALD PRIMEAU, SUSAN ROBERTSON, SUE SMITH,

Plaintiff,

v.

INDEPENDENT CITIZENS REDISTRICTING COMMISSION,

Defendant.

MSC. No. 164022

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

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

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TABLE OF CONTENTS

Statement of Basis of Jurisdiction 1

Statement of Questions Involved 1

Introduction 1

Statement of the Facts 1

A. The Commission 1

B. The Hickory Plan 4

C. Litigation 10

Standard of Review 13

Argument 14

I. The Hickory Plan Does Not Provide a Disproportionate Advantage to Any Political Party 14

A. The Constitution Does Not Demand Zero Deviation from Ideal Measures 14

B. Plaintiffs' Arguments Concerning the Governing Standard Lack Any Basis in the Constitutional Text 24

1. Strict Scrutiny Does Not Apply 24

2. The Standard of Deference Is Not Germane and, in Any Event, Favors the Commission's Discretion 28

3. Plaintiffs Misread the Advice the Commission Received 33

C. The Evidence Establishes That the Hickory Plan Complies With the Constitution 34

1. The Commission Avoided Any Disproportionate Advantage 34

2. Plaintiffs Fail to Establish a Constitutional Violation 35

a. The PTV Plan 35

b. The Commission's Process 39

II. The Hickory Plan Does Not Violate Any Other Provision of the State Constitution 42

A. Plaintiffs' Free Speech and Association Claims Fail 42

B. Plaintiffs' Purity of Elections Clause Claim Fail 44

III. The Commission's Position Regarding Procedure 46

Conclusion 50

TABLE OF AUTHORITIES

CASES

AbdulSalaam v Franklin Co Bd of Comm'rs,
399 F App'x 62 (CA 6, 2010) 43

Adair v Michigan,
497 Mich 89; 860 NW2d 93 (2014) 15

Am Axle & Mfg, Inc v City of Hamtramck,
461 Mich 352; 604 NW2d 330 (2000) 22, 23

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273 Mich 316; 262 NW 922 (1935) 29

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413 Mich 224; 321 NW2d 615 (1982) 17, 30

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413 Mich 143 (1982) 13

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220 Ariz 587; 208 P3d 676 (2009) 30–31

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1:22-cv-00054 (WD Mich) 11

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756 F2d 1032 (CA 4, 1985) 18

Bloch v Ribar,
156 F3d 673 (CA 6, 1998) 43

Bone Shirt v Hazeltine,
461 F3d 1011 (CA 8, 2006) 36

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495 Mich 209; 848 NW2d 380 (2014) 28–29

Bonneville Co v Ysursa,
142 Idaho 464; 129 P3d 1213 (2005) 30, 31

Branch v Smith,
538 US 254; 123 S Ct 1429; 155 L Ed 2d 407 (2003) 41, 49

Brnovich v Democratic Nat'l Comm,
141 S Ct 2321; 210 L Ed 2d 753 (2021) 26

Burdick v Takushi,
504 US 428; 112 S Ct 2059; 119 L Ed 2d 245 (1992) 26

RECEIVED by MSC 2/9/2022 10:17:23 PM

RECEIVED by MSC 2/9/2022 10:17:23 PM

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289 Mich 499; 286 NW 805 (1939) 14

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206 F3d 502 (CA 5, 2000).. 25

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503 Mich 42; 921 NW2d 247, 250 (2018).. 2

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257 Mich App 96; 667 NW2d 68, 72 (2003) 42–43

Crego v Coleman,
463 Mich 248; 615 NW2d 218 (2000) 24

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93 F3d 1212 (CA 4, 1996).. 25

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412 US 735; 93 S Ct 2321; 37 L Ed 2d 298 (1973) 17, 31, 44

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468 Mich 416; 662 NW2d 710 (2003) 18

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138 S Ct 1916; 201 L Ed 2d 313 (2018) 19, 27

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479 Mich 554; 737 NW2d 476 (2007) 30

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182 Mich App 193; 452 NW2d 471 (1989).. 45

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578 US 253 (2016).. 25

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993 F Supp 2d 1042 (D Ariz 2014).. 26

In re Indep Citizens Redistricting Comm for State Legislative & Congressional Dist's Duty to Redraw Dists by Nov 1, 2021,
507 Mich 1025; 961 NW2d 211 (2021)..2, 4, 42

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196 F3d 1216 (CA 11, 1999).. 36

RECEIVED by MSC 2/9/2022 10:17:23 PM

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399 Wis 2d 623; 967 NW2d 469 (2021).. 34, 35, 44

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347 Mich 579; 81 NW2d 349 (1957) 48

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680 F3d 686 (CA 6, 2012)... 43

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--NE3d--, 2022 WL 110261 (Ohio, 2022) 16

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--F Supp 3d--, 2021 WL 4866354 (ND Ill Oct 19, 2021) 27

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387 Mich 506; 198 NW2d 385 (1972) 27

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465 US 271; 104 S Ct 1058; 79 L Ed 2d 299 (1984).. 44

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Pennhurst St Sch v Halderman,
465 US 89 (1984) 11

RECEIVED by MSC 2/9/2022 10:17:23 PM

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565 US 388; 132 S Ct. 934 941; 181 L Ed 2d 900 (2012) 32

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305 Mich 636; 9 NW2d 872 (1943) 30

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470 Mich 415; 685 NW2d 174 (2004) 27

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384 Mich 390; 185 NW2d 9 (1971) 15, 42

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549 US 1; 127 S Ct 5; 166 L Ed 2d 1 (2006) 48

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479 Mich 1; 740 NW2d 444 (2007) 16, 44, 45

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381 Mich 304; 160 NW2d 883 (1968) 47

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486 Mich 311; 783 NW2d 695 (2010) 24–25

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2:21-cv-1291-AMM, 2022 WL 265001 (ND Ala Jan 24, 2022) 5

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412 Mich 571; 317 NW2d 1 (1982) 45

Sw Voter Registration Ed Project v Shelley,
344 F3d 914 (CA 9, 2003) 48

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RECEIVED by MSC 2/9/2022 10:17:23 PM

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CONSTITUTIONAL PROVISIONS

Const 1963, art 1, § 3 42

Const 1963, art 1, § 5 42

Const 1963, art 2, § 4 44

Const 1963, art 4, § 6 .... *passim*

Const 1963, art 6, § 4 1

Const 1963, art 6, § 13 .... *passim*

Const 1963, art 6, § 14 32

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2 USC 2a 49

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STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction under Mich Const 1963, art 4, § 6(19) and art 6, § 4.

STATEMENT OF QUESTIONS INVOLVED

Does the State House redistricting plan (known as the Hickory plan) provide a disproportionate advantage to any political party, burden Plaintiffs' rights of free speech and association, or contravene the State Legislature's obligation to enact laws preserving the purity of elections?

The Commission answers: no.

INTRODUCTION

This is a dispute over angels dancing on the head of a pin. One would never guess it from Plaintiffs' brief, but the difference between the enacted State House plan and Plaintiffs' alternative plan on the widely accepted efficiency-gap measure is 0.2%. These and other differences at issue carry no practical or legal significance. Plaintiffs do not argue otherwise. Instead, they ask this Court to adopt the reckless, unsupportable legal rule that "there is no *de minimis*, tolerable, or acceptable level of vote dilution in a redistricting plan." Plaintiffs' Brief (Br.) 33. But the operative constitutional phrase "disproportionate advantage" signals a different rule turning on the magnitude of deviations from the ideal. Zero is neither a realistic nor constitutionally demanded standard. Dozens, if not hundreds, of cases examining claims of vote dilution distinguish between minor and severe burdens on voting rights, and this Court should do so as well. It should deny all requested relief.

STATEMENT OF THE FACTS

A. The Commission

For most of Michigan's history, redistricting was conducted by the State Legislature or, when that process failed, this Court. Ronald Liscombe & Sean Rucker, *Redistricting in*

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Michigan Past, Present, and Future, 99 Mich B J 18, 19–22 (Aug 2020). This process enabled elected politicians to draw district lines favoring their partisan interests and disfavoring their partisan opponents. In 2011, for example, a federal court found that the Republican-controlled State Legislature "deliberately dr[e]w Michigan's legislative districts to maximize Republican advantage and, consequently, disadvantage Democratic voters, Democratic candidates, and the Democratic Party." *League of Women Voters of Mich v Benson*, 373 F Supp 3d 867, 883 (ED Mich 2019), *vacated and remanded sub nom Chatfield v League of Women Voters of Mich*, 140 S Ct 429 (2019).

In 2018, the nonpartisan advocacy organization Voters Not Politicians (VNP) successfully placed an initiative on the statewide ballot (Proposal 18-2) proposing that redistricting authority be transferred to an independent commission. *Citizens Protecting Michigan's Const v Secretary of State*, 503 Mich 42, 56–57; 921 NW2d 247 (2018). VNP contended that Proposal 18-2 would establish "a fair, impartial, and transparent redistricting process." Def. App. 263a. VNP emphasized the importance of redistricting plans oriented around communities of interest and represented that, under the new proposed system, members of the public would be able to "tell the Commission how they want their communities defined through a series of public hearings and online before any maps are drawn." *Id.* ("What are communities of interest and how will the Commission incorporate them into the maps?"). VNP also asserted that its initiative would combat gerrymandering, which occurs "when those in charge use the redistricting process to draw district maps to give one political party an unfair advantage." *Id.* ("What is 'gerrymandering?'"). Proposal 18-2 was "overwhelmingly" approved by Michigan voters and codified at Article IV, Section 6 of the State Constitution ("Section 6"). *In re Indep Citizens Redistricting Comm for State Legislative & Congressional Dist's Duty to Redraw Districts by Nov 1, 2021*, 507 Mich 1025; 961 NW2d 211 (2021) (WELCH, J., concurring).

Section 6 addresses gerrymandering in three basic ways:

First, it mandates a balanced body of Commissioners "composed of thirteen registered voters, randomly selected by the Secretary of State, of whom four each would be affiliated with Michigan's two 'major political parties' and five would be unaffiliated with those two parties." *Daunt v Benson*, 999 F3d 299, 304 (CA 6, 2021) (citation omitted). Individuals with recent political experience (e.g., as political candidates, elected officials, lobbyists, or legislative employees) are barred from service. Const 1963, art 4, § 6(1).

Second, Section 6 ensures that no plan will take effect without bipartisan support within the Commission. Section 6 requires that, to become law, a plan must obtain a majority vote and votes from "at least two commissioners who affiliate with each major party, and at least two commissioners who do not affiliate with either major party." *Id*. art 4, § 6(14)(c). If no plan satisfies that standard, Section 6 provides a run-off procedure, requiring that a plan, to become law, receive the highest total points in a ranked-choice voting process and rank among the top half of plans "by at least two commissioners not affiliated with the party of the commissioner submitting the plan." *Id*. art 4, § 6(14)(c)(iii).

Third, Section 6 requires that the Commission "shall abide by" enumerated "criteria in proposing and adopting each plan, in order of priority." *Id*. art 4, § 6(13). Subsection 13 identifies seven criteria, labeled (a) through (g). The first is compliance with federal law, including the United States Constitution and the Voting Rights Act. *Id*. art 4, § 6(13)(a). The second requires that districts be "geographically contiguous." *Id*. art 4, § 6(13)(b). The third mandates that districts "shall reflect the state's diverse population and communities of interest." *Id.* art 4, § 6(13)(c). These communities "may include," without limitation, "populations that share cultural or historical characteristics or economic interests," but they "do not include

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relationships with political parties, incumbents, or political candidates." *Id.* art 4, § 6(13)(c). The fourth criterion states:

> Districts shall not provide a disproportionate advantage to any political party. A disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness. *Id*. art 4, § 6(13)(d).

The fifth prohibits plans from "favor[ing] or disfavor[ing] an incumbent elected official or a candidate." *Id*. art 4, § 6(13)(e). And the final two criteria dictate that districts "shall reflect consideration of county, city, and township boundaries" and "shall be reasonably compact." *Id*. art 4, § 6(13)(f) & (g). In addition to adhering to these criteria, the Commission, "[b]efore voting to adopt a plan . . . shall ensure that the plan is tested, using appropriate technology, for compliance with the criteria . . . ." *Id*. art 4, § 6(14)(a).

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). The Constitution provides that, "[i]n 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." *Id.* art 4, § 6.

B. The Hickory Plan

1. The Commission convened for its inaugural session in September 2020. However, because the census results were released "six months late," *In re Indep. Citizens Redistricting Comm*, 507 Mich at 1025 (WELCH, J., concurring), the Commission lacked the necessary data to prepare redistricting plan until August 2021. The Commission "act[ed] diligently pursuant to its constitutional mandate" and did not wait to begin its work. *Id.*

In March 2021, five months before the census results were released, the Commission hired the redistricting consulting firm Election Data Services and a nationally recognized political scientist, Dr. Lisa Handley, to advise it and provide "line drawing and technical

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services." The Commission also received presentations from other redistricting experts, including a presentation on accepted metrics for measuring partisan fairness. And prior to the data's release, the Commission conducted hearings across the state to receive public input.

2. The Commission took care to ensure that its plans would "not provide disproportionate advantage to any political party." Const 1963, art 4, § 6(13)(d). In March, it received a presentation from Dr. Moon Duchin, a mathematician and "expert in redistricting" whose opinions courts have found "highly credible." *Singleton v Merrill*, 2:21-cv-1291-AMM, 2022 WL 265001, at *20 (ND Ala Jan 24, 2022). Dr. Duchin provided background information to the Commission on partisan fairness and introduced commissioners to the basic accepted measures, such as the efficiency gap and mean-median scores. Def. App. 110a.

In June 2021, the Commission again discussed partisan fairness metrics. That month, the Commission formed an internal, bi-partisan subcommittee to consider procedures for ensuring that maps comply with all constitutional criteria. The subcommittee proposed a list of topics for discussion with its advisors, including how to guarantee no partisan advantage for political parties. Def. App. 118a–123a. Commissioners stated that they had "thought . . . a lot" about "political fairness" and needed guidance on the "interpretation of political fairness" *Id*. at 119a. Dr. Handley responded, providing another overview of fairness metrics and advising that there are "dozens of ways to determine political fairness mathematically." *Id*. Dr. Handley demonstrated her expertise with a summary of the measures and advised that, "as a political scientist, I think that you could use my assistance . . . ." *Id.* The Commission agreed, and two days later authorized Dr. Handley to advise the Commission on partisan fairness metrics. Map-drawing was yet two months away.

In July 2021, Dr. Handley delivered a one-hour presentation on partisan-fairness measures to the Commission. She emphasized that the "Michigan State Constitution requires

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the use of accepted measures of partisan fairness," Def. App. 139a, and focused on those metrics that enjoy wide acceptance by courts and scholars and can be conveniently imported to redistricting software for use by citizen commissioners. Those measures are the efficiency gap, lopsided margin test, mean-median, and declination measures.

Dr. Handley again briefed the Commission on partisan fairness on August 6, 2021. She provided the Commission with a formal memorandum recommending that the Commission rely on the efficiency gap, lopsided margins, and mean-medians tests because they are: (1) "easy to understand" and "straightforward to calculate"; (2) can be utilized conveniently in redistricting software to provide real-time updates on partisan effects of individual decisions; and (3) "have been introduced and accepted by federal and state courts as useful tools for determining if a redistricting map is politically fair." Def. App. 141a. The Commission followed this advice. Plaintiffs assert that the Commission "never officially adopted *any* redistricting criteria, whether as to partisan fairness or any other." Br. 12. That is false. On September 23, the Commission adopted three criteria suggested by Dr. Handley to evaluate whether the drafted maps give a disproportionate advantage to any political party, as well as a votes-to-seats comparison. Def. App. 149a–150a.

3. Throughout the process, the Commission's General Counsel, Julianne Pastula, advised the Commission that its plans would be prohibited from affording any party a disproportionate advantage and that the Commission needed to consider partisan-fairness measures. Def. App. 151a. It is not true that Ms. Pastula "resisted allowing [the Commission] to consider partisan fairness data while drawing draft maps" Br. 10. To the contrary, she encouraged it. The record items Plaintiffs cite involve Ms. Pastula's advice before complete maps were prepared and reflect her view that partisan-fairness metrics measure complete plans and cannot practicably be consulted in judging partial plans or individual districts. Def. App. 145a ("And

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for partisan fairness, that's one, again that is measured more on the statewide level.")); Def. App. 146a ("The partisan fairness cannot be run on individual districts"). Ms. Pastula, however, consistently reiterated the Commission's obligation to avoid any disproportionate advantage and advised the Commission on accepted measures of fairness. Def. App. 151a; see also Def. App. 154a (Pastula advising that "the Michigan Constitution has…a partisan fairness requirement" and that it "specifies . . . accepted measures of partisan fairness"); Def. App. 158a ("[T]he Constitution provides [that] there shall not be a disproportionate advantage.").

But no expert or lawyer ever advised the Commission that zero deviation from ideal measures is legally required. Dr. Handley counseled that accepted partisan-fairness metrics do not dictate a standard of perfect symmetry of proportionality, but rather utilize ranges of acceptable results and ranges at which scores become unacceptable. On August 6, taking the efficiency gap as an example, Dr. Handley explained that while 21.3% is "too high," "you don't need it at zero" and "5% is probably okay." Def. App. 143a. And in early October 2021, Dr. Handley explained that while a 0% efficiency gap may be possible in theory, "it might not be possible if you have a whole lot of other criteria that you want to consider." Def. App. 156a. She clarified that since the Commission had "other concerns here to deal with" she was "not saying" the Commission could achieve a 0% efficiency gap. *Id.* As the same time, Ms. Pastula similarly advised the Commission not to focus on the number *per se*, but to be sensitive "the further from zero in either direction": pro-Republican or pro-Democrat. *Id.*

On October 5, Dr. Handley briefed the Commission on "Possible Unacceptable Scores of Partisan Fairness," explaining to them that the courts have generally found double-digit efficiency gaps to be impermissible and that some political scientists believe that a 7 or 8% efficiency gap is legally significant. Def. App. 160a–162a. Her presentation also addressed the

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mean-median and votes-to-seats metrics. She advised the Commission that courts in other states had struck down plans with mean-median differences of between 5.0 and 13.3, and that they had invalidated plans where a 48% Democratic vote share corresponded with them capturing 39.4% of seats.

At that meeting, Ms. Pastula emphasized that the goal was to "achieve scores that are [as] low as possible without sacrificing other criteria," *id.* at 158a, and that none of the plans being considered by the Commission had scores approaching the scores Dr. Handley had identified as problematic. Later in October, Ms. Pastula again emphasized that "[t]here is no language mandating zero political bias"; rather the goal is "not to give disproportionate advantage based on those accepted measures of partisan fairness which [our] expert identified" and that had "been accepted by the courts and offered to the Commission for its use….[D]isproportionate advantage are the keywords." Def. App. 167a.

4. The Commission's principal challenge in applying partisan-fairness measures is that the major parties' constituents are not evenly distributed in Michigan. Democratic voters are clustered in cities, whereas Republican voters are more spread out in suburban and rural areas. This is a recognized fact of political geography in the United States. See generally Jonathan A. Rodden, *Why Cities Lose: The Deep Roots of The Urban-Rural Political Divide* (2019). This fact was recognized in Michigan by Dr. Jowei Chen, the expert witness for the League of Women Voters in last decade's gerrymandering litigation, who found a "skew in Michigan's voter geography that slightly benefits the Republicans in districting," resulting "naturally from Democratic voters' tendency to cluster in urban areas of Michigan." Def. App. 023a. Based on his testimony, a federal three-judge court found that thousands of simulated redistricting plans created without reference to partisan data would produce between 56 or even 60 "Republican House districts" in elections where Republican candidates won 50.3%

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of the statewide vote. *Benson*, 373 F Supp 3d at 894. Dr. Chen's report shows that redistricting plans drawn to a median-mean of zero would be extreme partisan outliers in favor of the Democratic Party. See Def. App. 022a.

The Commission viewed itself as affirmatively obligated to counter this natural Republican advantage. See Def. App. 165a ("One of the reasons your partisan fairness measures are demonstrating the scores that they are is because the geography of Michigan . . . ."). For example, rather than minimize political boundary splits in Wayne County, the Commission's drafted plans split Detroit into many districts, thereby spreading its heavily Democratic vote share into many districts. See Def. App. 185a. This was opposed by some who advocated that Detroit splits should be minimized and that majority-minority districts should be created in Detroit. As Commissioners worked to draw and revise the maps, they continuously tracked partisan fairness metrics and made efforts to reduce the numbers. For instance, in November 2021, commissioners working on the Hickory plan, which was eventually adopted as the House plan, split Ann Arbor among four districts to spread its Democratic voters into many districts and improve partisan fairness scores.[1] See *id*. at 181a.

The Commission, however, did not view itself as entitled to focus only on partisan metrics. At times, competing goals cut against that purpose. For example, the Commission received feedback at public hearings asking it to keep the city of Flint whole, and the Commission implemented this recommendation in the enacted House map. Def. App. 179a–180a. Likewise, on the basis of Dr. Handley's finding that the Chaldean community in Michigan—a group of Christian Arab-Americans—is politically cohesive, the Commission created two districts for the Chaldean community of interest in and around Sterling Heights and Utica. Def. App. 177a–178a; Def. App. 175a.

[1] Commissioners named many proposed plans after tree species (e.g., the Magnolia plan, the Palm plan, the Cherry plan, and the Birch plan).

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The Commission achieved a balance between such goals and partisan fairness measures. According to Dr. Handley's calculations, the Hickory plan had 5.3% Lopsided Margin, a 2.7% Mean-Median, a 4.3% Efficiency Gap, and a 0.5% Vote/Seat share. These numbers fell well below measures Dr. Handley identified as problematic and within the range that Dr. Chen identified in last decade's litigation as acceptable. The Commission posted State House plans, including the Hickory plan, for public notice and comment. See Const 1963 art 4, § 6(14). At public hearings and online, the Commission heard critiques of its plans. A consistent theme, however, emerged: the Hickory plan was the best. See Hickory Map Public Comment Portal.[2]

On December 28, 2021, the Commission voted on, and adopted, Michigan's final maps. For the State House, the Commission adopted the Hickory plan by an 11–2 vote. All Democratic and independent commissioners voted for the Hickory plan. Only two Republican commissioners cast their votes for other House plans. According to the elections Dr. Handley used[3], the Hickory Plan has an efficiency gap of 4.8%—below the target of 7% Dr. Handley identified as the warning mark.

C. Litigation

The Commission has faced three lawsuits so far.

First, a group led by the Detroit Caucus alleged that the Commission's House, Senate, and congressional plans violate the Voting Rights Act. They argued that it was improper for the plans to divide Detroit into numerous districts, which they alleged split the Detroit black community of interest and diluted black voting strength. This Court denied relief on February

[2] Available at https://michigan.mydistricting.com/legdistricting/comments/plan/262/23 (last accessed Feb 8, 2022).

[3] Dr. Handley used historical election results to evaluate the partisan fairness of the redistricting plans. For her analysis, she used a composite election index comprised of statewide general elections between 2012 and 2020. Def. App. 215a.

3, 2022. *Detroit Caucus v Indep Citizens Redistricting Comm*, --Mich--; --NW2d-- (2022) (Docket No. 163926) (Feb 3, 2022).

Second, a group of voters affiliated with the Republican Party filed suit in the U.S. District Court for the Western District of Michigan against the adopted congressional plan, alleging *inter alia* that the Commission failed to respect communities of interest, which these plaintiffs contend are defined by city, county, and township boundaries. See *Banerian v Benson*, 1:22-cv-00054 (WD Mich). According to these plaintiffs, the Commission was obligated to subordinate other goals, including partisan-fairness, to the goal of preserving political-subdivisions. The case is pending and the Commission is vigorously defending the suit.[4]

Third, the League of Women voters and individual voters (Plaintiffs) filed this suit, alleging that the Commission's maps violate the prohibition on plans that afford a "disproportionate advantage to any political party." Const 1963, art 4, § 6(13)(d); Br. 14. The complaint alleges that "zero" "was the goal," and that the Hickory plan's metrics above zero afford an unconstitutional advantage to the Republican Party. See Br. 34.

Plaintiffs rely on an alternative House plan submitted to the Commission in October 2021 by Promote the Vote (PTV) and the expert report of Dr. Warshaw. Plaintiffs criticize the Commission for relying on Dr. Handley, whose credentials they disparage, but Dr. Warshaw's report utilized the same measures Dr. Handley recommended the Commission use and that his "estimates" of the measures "are not significantly different from the assessment of . . . Dr. Lisa Handley." Warshaw Rep. 4 n 6. Plaintiffs also contend that the PTV plan demonstrates that plans with lower measures were possible, but the differences between the

[4] Among other things, the Commission intends to argue that the effort to enforce state law against instrumentalities of the state must be brought in this Court, not in federal court. *Pennhurst St Sch v Halderman*, 465 US 89 (1984).

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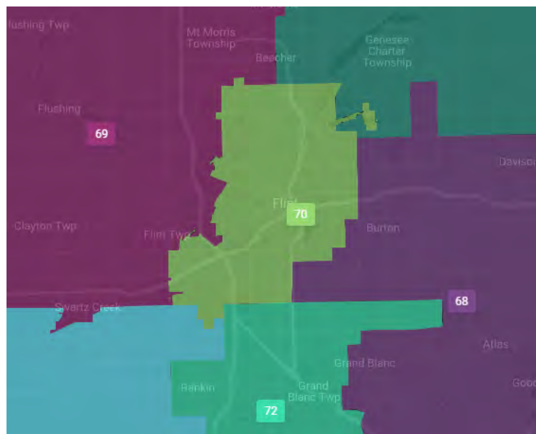
plans are incredibly small. Dr. Warshaw measured the plans by various metrics utilizing State House election results and shows the following differences:

Measure	Hickory Plan	PTV Plan
Democratic Seat Share on 52% Vote Share	49%	49%
EG	Pro Republican 4.6%	Pro Republican 4.4%
Mean-Median	Pro Republican 3.0%	Pro Republican 2.8%
Symmetry Bias	Pro Republican 4.7%	Pro Republican 3.8%
Declination	Pro Republican 28.2%	Pro Republican 29.6%

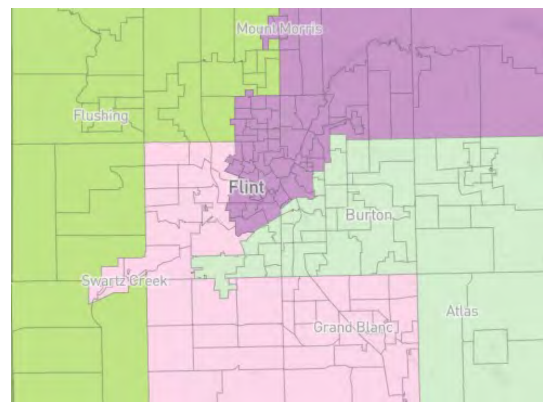
Warshaw Rep. 14. Plaintiffs' brief in support of their complaint does not argue that these, or any other differences are large. Instead, they argue that "there is no *de minimis*, tolerable, or acceptable level of vote dilution in a redistricting plan." Br. 33. They also do not allege that the Commission acted with intent to favor the Republican Party.

The PTV plan does not achieve many goals the Commission achieved in the Hickory plan. As noted, the enacted plan keeps Flint whole, but the PTV plan splits Flint in four ways.

Enacted Plan



PTV Plan



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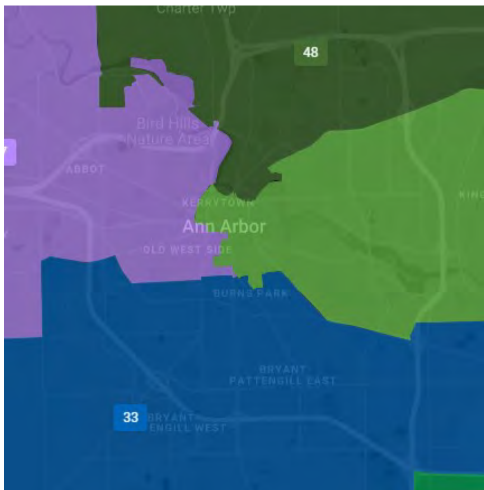
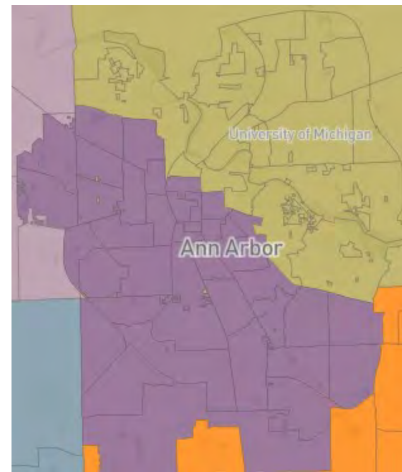
And while the enacted plan makes the Chaldean community in Macomb County the anchor of two districts, the PTV plan splits Sterling Heights and the Chaldean community. Plaintiffs do not argue that the PTV plan achieves the Commission's communities of interest goals.

Enacted Plan



PTV Plan



Instead, they criticize the Commission's approach to communities of interest and appear to contend that its choices in this respect are illegitimate. Br. 42 n 17.

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 in specific applications." *In re Apportionment of State Legislature—1982*, 413 Mich 96, 114; 321 NW2d 565 (1982). The Commission's redistricting plans have the effect of Michigan laws, Const 1963, art 4, § 6(22), and Plaintiffs "must overcome the presumption that" the plans are "constitutional, and" they "'will not be declared unconstitutional unless clearly so, or so

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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)).

ARGUMENT

I. The Hickory Plan Does Not Provide a Disproportionate Advantage to Any Political Party

Plaintiffs' claim under Subsection 13(d) lacks merit. The Constitution directs the Commission to avoid a "disproportionate advantage to any political party," as "determined using accepted measures of partisan fairness." Const 1963, art 6, § 13(d). This is the fourth of seven criteria listed in descending "order of priority." Const 1963, art 6, § 13. This provision requires the Commission to affirmatively avoid disproportionately advantaging either party. It does not, however, require the Commission to achieve zero deviation from ideal measures of symmetry, it does not condemn minor differences with a litigant's alternative plan, and it does not eviscerate the Commission's other, often competing redistricting obligations. The Commission satisfied its obligation under Subsection 13(d) by taking affirmative action to overcome the Republican Party's natural geographic advantage and achieving minor deviations from ideal measures.

A. The Constitution Does Not Demand Zero Deviation from Ideal Measures

The parties agree that Subsection 13(d) forbids a "plan resulting in or having the effect of creating a 'disproportionate advantage.'" Br. 24. The Commission understood its obligation to avoid even unintentionally providing a disparate disadvantage to one political party, and it took affirmative steps to comply. The Commission hired an expert, received advice on accepted methods, made affirmative efforts to minimize deviations from ideal measures, and achieved measures within an acceptable range.

The question before the Court is not whether the Commission was obligated to avoid providing a disproportionate advantage to either party. It did that. Instead, the question is

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whether it was obligated to do more. Plaintiffs contend that nothing short of reducing all partisan metrics to "zero" is permissible. But even Plaintiffs' preferred plan does not achieve this. And, more importantly, nothing in the text, structure, or ratification history of Subsection 13(d) supports this view.

1. "[T]he plain meaning of the text," see *Adair v Michigan*, 497 Mich 89, 102; 860 N.W.2d 93 (2014), is not that a plan must "minimize[] vote dilution as much as possible including to zero," Br. 34. Instead, the text forbids a "disproportionate advantage." Const 1963, art 6, § 13(d). That text is a poor fit for a requirement of perfection. Central to the concept of "disproportion" is size. The word "disproportion" means "disparity," as in "a disproportion between the large head and the average-size body." *Disproportion*, *Webster's Third New International Dictionary, Unabridged Edition* (1971). A *disparity* is not a small difference, and a head only slightly smaller or larger than the ideal size for a given body is not *disproportionate*. The degree of difference matters.

This is even more apparent when the text is viewed under "the sense most obvious to the common understanding," that "the great mass of the people themselves[] would give." *In re Proposal C*, 384 Mich 390, 405; 185 NW2d 9 (1971) (quotation omitted). When a five mile-per-hour wind is at one football team's back and in the other's face, the commentator does not normally announce a *disproportionate advantage*. When Michiganders hear that a day's temperature is five degrees above the average for a given day or month, they are unlikely to think it *disproportionately* warm. And when summer gas prices rise by four cents, they do not typically identify the climb as *disproportionate*. If these numbers were larger—a 30-mile-per hour wind, 17 degrees above the average, or a price increase of four dollars—the word

disproportionate would become appropriate. But nothing about the term suggests *zero* difference between an ideal and a reality. Plaintiffs offer no contrary textual analysis.[5]

Other language was available to the proponents of Proposal 18-2 if "a 0% Efficiency Gap" was "the goal." Br. 1. Subsection 13(b) could have been written to *require* a *proportionate* representation to *every* party, it could have guaranteed *zero* difference between parties' relative ability to win majorities, or—like Ohio's constitution—it could have demanded that "[t]he statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio." Ohio Const art XI, § 6(B); see *League of Women Voters of Ohio v Ohio Redistricting Comm*, --NE3d--, 2022 WL 110261, at *22 (Ohio, 2022). There is a significant difference between such verbiage, mandating strict achievement of perfection, and the negative prohibition on *disproportion*—a large difference between real and ideal.

2. The constitutional structure further undermines Plaintiffs' position. "[E]very constitutional provision must be interpreted in the light of the document as a whole." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 34; 740 NW2d 444 (2007) (citation and edit marks omitted)). But to read an inflexible zero-deviation requirement into Subsection 13(d) would effectively eliminate many or all other mandatory criteria of Subsection 13. A "legislative body must balance" all "legitimate legislative considerations," *Vesilind v Va State Bd of Elections*, 295 Va 427, 448; 813 SE2d 739 (2018) (citation omitted), and Subsection 13 renders seven distinct criteria mandatory: "[t]he commission *shall* abide by" them. Const 1963, art 6, § 13(d) (emphasis added). The criteria pull in different directions,

[5] Plaintiffs' discussion of "*partisan symmetry*" and "*proportional representation*" misses the point. Br. 25. Whether measuring symmetry or proportionality, the question is whether *zero* is the constitutional mandate. On that point, Plaintiffs have nothing meaningful to say.

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and all "have substantial political consequences"—since "it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another," *Gaffney v Cummings*, 412 US 735, 753; 93 S Ct 2321; 37 L Ed 2d 298 (1973). A zero-deviation rule would subordinate all other criteria and may even eliminate many, as compactness, political-subdivision lines, and communities of interest would be sacrificed to a rigid fairness quota.

In this regard, this Court's decision in *Appeal of Apportionment of Wayne Co, Co Bd of Comm'rs-1982*, 413 Mich 224; 321 NW2d 615 (1982), which Plaintiffs emphasize (at 22), actually rejects their position. The decision rebuffed a requirement of "exhaustive compliance with each criterion" in a mandatory list, and it did so despite strict text mandating that districts be "as compact and as nearly square in shape as is practicable." *Id.* at 258 (quoting statutory text). The Court reasoned that, if this was "[r]ead literally and given an absolute priority," then no criteria further down the chain of priority could "be given any effect." *Id.* For example, a subordinate criterion forbade splitting political subdivisions, but literal enforcement of the compactness requirement rendered it "most unlikely . . . that any district line would coincide with any township, village, city or precinct line." *Id.* at 259. Because reading the compactness criteria strictly "would give no effect whatsoever" to other "criteria," the Court's "duty to read the statute as a whole" foreclosed that literal reading. *Id.*

That result is all the more compelled here, where Plaintiffs' rendition of the phrase *disproportionate advantage*, even taken in isolation, is not literal. Plaintiffs' position fares worse than the position rejected in *Apportionment of Wayne County*. Whereas the argument rejected there posited that the compactness requirement overrode subordinate criteria in the rank of priority, see *id.* at 258–59, Plaintiffs argue, in effect, that the fairness requirement eliminates criteria both above and below Subsection 13(d), rendering partisan fairness the Commission's

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"*only goal*." Br. 4. As in *Apportionment of Wayne County*, the mere fact that other criteria exist disproves this interpretation.[6]

Further, the text's concern with permitting achievement of all goals stands reflected in the language of the various provisions, which grant flexibility: districts must be "*reasonably* compact"; "*reflect consideration* of county, city, and township boundaries"; "*reflect* the state's diverse population and communities of interest," which "*may include*, but shall not be limited to, populations that share cultural or historical characteristics or economic interests." Const 1963 art 4, § 6(13)(c), (e), and (g) (emphasis added). These flexible terms give additional reason to view the word *disproportionate* in Subsection 13(d) as barring large deviations from the ideal, but flexibly permitting small ones. See *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) (discussing "[t]he doctrine of *noscitur a sociis*, i.e., that 'a word or phrase is given meaning by its context of setting'") (citation omitted).

3. The Constitution further defines how disproportionate advantage is to be determined: "using accepted measures of partisan fairness." Const 1963, art 6, § 13(d). These measures do not point to ideals and condemn small variations from them. "One thing the measures have in common is that they" look to "the *magnitude* of the bias." Barry Burden & Corwin Smidt, Evaluating Legislative Districts Using Measures of Partisan Bias and Simulations 2 (Dec 2020). No other approach would make sense. Partisan-fairness measures are necessarily imprecise, because they forecast future election results based on past results, often from different electoral units. For example, Dr. Warshaw opines that, "[i]n the 2020 presidential election, Democrat Joe Biden received about 51.4% of the two-party vote, but he

[6] Plaintiffs attack a straw man in suggesting that this argument renders Subsection 13(d) optional rather than mandatory. See Br. 21–22. Not so. The point is not that Subsection 13(d) lacks mandatory force, but that the constitutional context sheds light on what it does—and does not—require. "[T]he word 'shall' does not change the essential character of the" words that follow it. *Beckham v Harris*, 756 F2d 1032, 1038 n 8 (CA 4, 1985).

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would have only won 49% of the State House districts in the Hickory plan." Rep. 4. Because different candidates with different profiles stand for election to the State House, this difference—51% to 49%—must be taken with a grain of salt. Reading significance into small differences is like seeing two news channels make slightly different weather forecasts—one predicts 24 degrees and the other 26 degrees—and concluding they are in stark disagreement when, in fact, they offer practically the same forecast.

Partisan fairness measures are like that—imprecise. They do not command adherence to *zero*. They afford a range and signal cause for concern when plans stray outside the range.

Efficiency gap. The efficiency gap defines all votes for a losing candidate as "wasted" and creates a measurement of the difference in the parties' "wasted" votes divided by the total number of votes. A party benefitting from a partisan gerrymander will have fewer wasted votes than the burdened party. Authors of the efficiency gap did not argue for a "zero" efficiency gap. Rather, they proposed a limit of "two seats for congressional plans and 8 percent for state house plans" above which an efficiency gap score would be identified as a "presumptive[]" gerrymander. Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering & the Efficiency Gap*, 82 U Chi L Rev 831, 837 (2015). See also *Gill v Whitford*, 138 S Ct 1916, 1933; 201 L Ed 2d 313 (2018) (recognizing that an "efficiency gap in the range of 7% to 10%" is suspect). The authors included the important caveat that "plans not be expected, based on sensitivity testing, ever to have an efficiency gap of zero over their lifetimes." Stephanopoulos, 82 U Chi L Rev at 837. In fact, they did not recommend that a court adopt a "zero threshold" for several reasons, including that the efficiency gap's calculation varies so much from election to election. *Id.* at 887. In practice, Michigan redistricting plans do not exhibit a zero efficiency gap, as shown in *Benson*. In that case, plaintiffs' expert, Dr. Chen, drew 1,000 simulated plans drawn with only neutral, non-partisan criteria, and "more than half of [his]

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simulated maps resulted in an efficiency gap within +/- 5% of 0. . . ." 373 F Supp. at 896 (indicating that Dr. Chen identified the then-enacted 2011 Congressional, House, and Senate plans' efficiency gaps as -19.8%, -12.1%, and -16.6%, respectively). The Hickory plan falls within the +/- 5% range Dr. Chen identified.

Mean-median. The mean-median measurement identifies the difference between the median or middle vote share across all districts and the mean or average vote share across all districts.[7] When these numbers diverge significantly, the district vote distribution is skewed in favor of one party and, conversely, when it is close, that distribution is more symmetric. Among those limitations is the reality that it is "sensitive to the outcome in the median district." *Ohio A. Philip Randolph Institute v Householder*, 373 F Supp 3d 978, 1028 (SD Ohio, 2019), *rev'd on other grounds*, 140 S Ct 102. In Michigan, Dr. Chen calculated the mean-median differences of his 1,000 simulated maps drawn without partisan data as between 2.0 to either 3.6 or 3.8%, depending on the elections used. Def. App. 021a (indicating that Dr. Chen calculated the mean-median difference of the then-enacted Congressional, House and Senate plans as 7.55%, 6.86%, and 5.97% respectively). Mean-median differences in this range are considered normal—and, indeed, Dr. Chen noted that the "modest skew in the simulated districting plans may result naturally from Democratic voters' tendency to cluster in urban areas in Michigan . . ." *Id*. at 023a. See also *League of Women Voters of Pa v Commonwealth*, 65 Pa 1, 51; 178 A3d 737, 774, 820 (2018) (recognizing that Republicans had a "small natural geographic advantage" in Pennsylvania and, when Dr. Chen created simulated plans in that state, he found his simulated plans ranged from "a little over 0 percent to the vast majority of them being

[7] To illustrate, in a hypothetical three-district plan where two districts garner 9 votes for a candidate and one district garners 3, the mean vote share for that candidate is 4 but the median vote share is 6.

under 3 percent," a range Dr. Chen explained was "normal"). The Hickory plan falls within the range Dr. Chen identified.

Partisan symmetry across vote-seat curve. The vote-seat curve is a computer-generated graph that plots the portion of seats a party will win for a certain vote share. The theory behind this metric is that a difference between seats won and vote share—*e.g.*, 70% of the seats won with only 50% of the overall votes—would suggest an asymmetrical partisan skew. This partisan symmetry metric was proposed during the 1990s and was the subject of debate in *League of United Latin American Citizens v Perry*, 548 US 399; 126 S Ct 2594; 165 L Ed 2d 609 (2006) (*LULAC*). See generally Stephanopoulos & McGhee, 82 U Chi L Rev at 844–45. Both Justice Stevens, the metric's main proponent, and Justice Kennedy, the "swing" justice, in their respective opinions acknowledged that any departure from zero was not suspect, and the debate—then, as now—is when a deviation exceeds a reasonable range and becomes suspect. See, e.g., *LULAC*, 548 US at 420 (op. of KENNEDY, J.) (recognizing the need for a judicially-manageable standard based on partisan symmetry to evaluate "how much partisan dominance is too much"); *id.* at 468, n 9 (STEVENS, J., concurring in part) (suggesting either that "deviations of over 10% from symmetry create a prima facie case of an unconstitutional gerrymander" or that "a significant departure from symmetry is one relevant factor in analyzing whether . . . a districting plan is an unconstitutional partisan gerrymander"). One of the principal concerns with the partisan symmetry standard, according to Justice Kennedy, is the measure's resort to hypothetical, or "counterfactual," elections; "the existence or degree of asymmetry may in large part depend on conjecture about where possible vote-switchers will reside." *Id.* at 420 (op. of KENNEDY, J.).

Declination. Declination is another way to measure the difference between parties' seats and votes but this time with geometry (i.e., it involves the measurement of angles on the

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seats/votes chart between each party's mean vote share and the point on the 50% line between the mass of points representing each party).The proponent of this metric, Professor Warrington, has recognized that his metric is best understood as a range. He wrote that "two significant issues that must be addressed are the reality that any measure of asymmetry in vote distributions will vary from election to election . . . and that partisan asymmetry may arise from reasons other than gerrymandering." Gregory S. Warrington, *Quantifying Gerrymandering Using The Vote Distribution*, 17 Elec L J 39, 45 (2018). In particular, "adherence to the 1965 Voting Rights Act can introduce partisan asymmetries," as can the "inherent partisan advantages arising from how voters are distributed geographically." *Id*. at 46. For those and other reasons, only when the declination value exceeds 0.47 would Warrington conclude that he is "confident that it will not equal zero for a different election in the same ten-year redistricting cycle." *Id*. at 45–46. See also Craig F. Merrell, *An Introduction to Partisan Gerrymandering Metrics*, League of Women Voters of North Carolina, Dec 2017, at 9 (recognizing that the authors of the declination metric "suggest that values . . . greater than 0.47, should be investigated for gerrymandering").[8]

4. Because "the constitutional language is clear," "reliance on extrinsic evidence [is] inappropriate." *Am Axle & Mfg, Inc v City of Hamtramck*, 461 Mich 352, 362; 604 NW2d 330 (2000). But even if that were not so, Plaintiffs' interpretation is undermined in "the circumstances surrounding the adoption of the provision." *Taxpayers for Mich Const Gov't v Dep't of Tech, Mgmt & Budget*, --Mich --; --NW2d--, 2021 WL 3179659 at *6 (July 28, 2021).

Proposal 18-2 was not held up as an amendment to achieve strict equality of political parties. VNP's website informed voters that the requirement ultimately codified at Subsection (d) was meant to: "Not give an unfair advantage to any political party, politician, or candidate

[8] Available at https://lwvhcnc.org/PDFs/PartisanGerrymanderingMetrics_v2.pdf (last accessed Feb 8, 2022).

(no partisan gerrymandering)." Def. App. 264a ("How will the Commission draw maps?"). This prohibition on unfairness tracks the constitutional prohibition on disproportionate advantage, and both concepts are distinct from mandating zero deviation from the ideal. Indeed, the proponents complained that "modern-day gerrymandering allows a party to durably lock in advantages for itself" such that, "even when an election sees *massive* changes in the votes a party receives, there can be zero change in the number of seats that party wins." *Id.* at 263a (What is "gerrymandering"?) (emphasis added). Plaintiffs cite no evidence of concern with the types of small departure from ideal measures they address in this case.

The advocacy also suggested that Proposal 18-2 was not intended to override basic realities of political geography. A leading proponent and drafter of Proposal 18-2 asserted that "a Michigan redistricting commission won't change the fact that some seats will be considered safe for Republicans and others safe for Democrats, based on the fact [that] far more Republicans than Democrats live in Allegan and far more Democrats than Republicans live in Detroit." Def. App. 101a (quoting Nancy Wang, "an Ann Arbor attorney who helped draft the Michigan proposal and is president of Voters Not Politicians"). "But, she said, they will no longer be gerrymandered to favor incumbent politicians and political parties." *Id.* Nothing in such advocacy would lead "the great mass of the people," *Am Axle & Mfg*, 461 Mich at 363, to believe that the Commission would single-mindedly focus on overriding the natural Democratic Party disadvantage so as to achieve perfect partisan equality in voting.

Further, the evidence undermines Plaintiffs' assertion that "the *only goal* was to end partisan gerrymandering." Br. 4. Not so. A cornerstone feature of the advocacy was "communities of interest," which "can be based on local economies, school districts, cultural ties, or other characteristics." Def. App. 264a ("What are communities of interest and how will the Commission incorporate them into maps?"). Advocates announced the importance of

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“putting community interests and voter needs first,” Def. App. 273a, (quoting VNP campaign arguments), and voters were told that “[t]he public will tell the Commission how they want their communities defined,” and this feedback would then be “incorporated into the district maps,” Def. App. 264a (“What are communities of interest and how will the Commission incorporate them into maps?”). Voters were told the focus of the Commissioners’ work would be hearing comments and preparing plans to implement them, not focusing on political data to the exclusion of other considerations.

B. Plaintiffs’ Arguments Concerning the Governing Standard Lack Any Basis in the Constitutional Text

Plaintiffs ask this Court to look everywhere but the constitutional text to address their claims. That signals that something is amiss.

1. Strict Scrutiny Does Not Apply

Plaintiffs devote much of their brief to advocating a standard of “strict scrutiny.” Br. 30–33. Their argument contains not one mention of the constitutional text. Nor does it have any logical force.

Strict scrutiny is an equal-protection concept that turns on “a court’s characterization of the classifications created by a particular statute.” *Crego v Coleman*, 463 Mich 248, 262; 615 NW2d 218 (2000). It applies where a state actor employs “classifications based on ‘suspect’ factors such as race, national origin, or ethnicity.” *Id.* at 259. But the Subsection 13(d) analysis turning on disproportionate *effects* has no relation to “classifications.” Plaintiffs’ contention is not that the Commission employed suspect distinctions; they contend it should have done more to achieve partisan symmetry. Nothing about that argument implicates a strict-scrutiny standard. Strict scrutiny is not implicated “solely because [a law] results in disproportionate impact” and requires “proof of discriminatory intent or purpose.” *Shepherd Montessori Ctr*

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Milan v Ann Arbor Charter Twp, 486 Mich 311, 324; 783 NW2d 695, 700–01 (2010). The absence of any allegation of invidious intent defeats Plaintiffs' invocation of strict scrutiny.[9]

Plaintiffs direct the Court to cases concerning the fundamental right to vote, which they cite for the proposition that "there is no *de minimis*, tolerable, or acceptable level of vote dilution in a redistricting plan." Br. 33. But Plaintiffs fail to connect this precedent to Subsection 13(d). And their assertion is wrong. Dozens, if not hundreds, of cases hold that small deviations from ideal measures of voting equality "will be considered *de minimis* and will not . . . support a claim of vote dilution." *See, e.g., Daly v Hunt*, 93 F3d 1212, 1217–18 (CA 4, 1996); *Davis v Bandemer*, 478 US 109, 134; 106 S Ct 2797; 92 L Ed 2d 85 (1986) (plurality opinion) ("[D]iscrimination in reapportionment requires a showing of more than a de minimis effect . . . ."); *Swann v Adams*, 385 US 440, 444; 87 S Ct 569; 17 L Ed 2d 501 (1967) ("De minimis deviations are unavoidable . . . ."); *Chen v City of Houston*, 206 F3d 502, 523 n 15 (CA 5, 2000) (finding deviations from perfect equality in voting "sufficiently de minimis" to avoid constitutional violation).

Every voting standard that turns on effect, rather than intent, permits small deviations from ideal measures without resort to strict scrutiny. The one-person, one-vote rule establishes a dilution standard for individual votes that "does not demand mathematical perfection." *Harris v Ariz Indep Redistricting Comm*, 578 US 253, 258 (2016). The law is clear that "'minor deviations from mathematical equality' do not, by themselves, 'make out a prima facie case of invidious discrimination'" and that "'minor deviations' [are] those in 'an apportionment plan with a maximum population deviation under 10%.'" *Id.* at 259 (citation omitted). In fact, the Supreme Court in *Harris* effectively announced the opposite of strict scrutiny:

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[9] For this reason, case law applying strict scrutiny to "classifications that . . . impinge upon the exercise of a 'fundamental right,'" *Plyler v Doe*, 457 US 202, 217; 102 S Ct 2382; 72 L Ed 2d 786 (1982) (footnote omitted), does not support Plaintiffs. They do not allege themselves to have been classified upon the exercise of a fundamental right.

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> Given the inherent difficulty of measuring and comparing factors that may legitimately account for small deviations from strict mathematical equality, we believe that attacks on deviations under 10% will succeed only rarely, in unusual cases.

Id. The court it affirmed expressly "decline[d]" to "import[] strict scrutiny into the one-person, one-vote context, a context in which the Supreme Court has made clear [courts] owe state legislators substantial deference." *Harris v Ariz Indep Redistricting Comm*, 993 F Supp 2d 1042, 1073 (D Ariz 2014). Even in congressional cases, the vote dilution standard "is a 'flexible' one." *Tennant v Jefferson Co Comm*, 567 US 758, 760; 133 S Ct 3; 183 L Ed 2d 660 (2012). This standard permits small deviations from perfection within an acceptable range.

Likewise, under the Voting Rights Act, which contains an "effects" test, see *Thornburg v Gingles*, 478 US 30, 43–44; 106 S Ct 2752; 92 L Ed 2d 25 (1986) (plurality opinion), "the size of the burden imposed by a challenged voting rule is highly relevant." *Brnovich v Democratic Nat'l Comm*, 141 S Ct 2321, 2338; 210 L Ed 2d 753 (2021). "The concepts of 'openness' and 'opportunity' connote the absence of obstacles and burdens that block or seriously hinder voting, and therefore the size of the burden imposed by a voting rule is important." *Id.* (edit marks omitted). The same is true under the so-called *Anderson-Burdick* framework for assessing burdens on the right to vote. See *Daunt v Benson*, 956 F3d 396, 406–07 (CA 6, 2020). "The level of scrutiny under this test 'depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.'" *Id.* at 407 (quoting *Burdick v Takushi*, 504 US 428, 434; 112 S Ct 2059; 119 L Ed 2d 245 (1992)). "[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters," no strict-scrutiny standard applies, and "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Burdick*, 504 US at 434).

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No case confronting a minor burden on the right to vote, in the absence of invidious intent, applies strict scrutiny. To the extent these lines of cases bear on the meaning of *disproportionate advantage*, they suggest a weighting standard requiring justification from the Commission only where large deviations from ideal measures are shown. Plaintiffs' citations are not to the contrary. One, *Phillips v Mirac, Inc*, 470 Mich 415; 685 NW2d 174 (2004), undercuts Plaintiffs' position by declining to apply strict scrutiny because "this case clearly does not result in discrimination by race, national origin, or ethnicity." *Id.* at 434. Another, *Mich State UAW Community Action Program Council (CAP) v Austin*, 387 Mich 506; 198 NW2d 385 (1972), applied the predecessor to the *Anderson-Burdick* series and found that "removing otherwise qualified citizens from the voter rolls clearly affects the right to vote," which the Court viewed as a severe (not minor) burden on the right to vote. *Id.* at 514. Plaintiffs' reliance on *Reynolds v Sims*, 377 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964), fails to appreciate that "*Reynolds* and its progeny teach that courts may tolerate *de minimis* variances." *McConchie v Scholz*, --F Supp 3d--, 2021 WL 4866354, at *13 (ND Ill Oct 19, 2021) (three-judge court)). Their citation to a case on standing *Gill*, 138 S Ct at 1916, ignores that the words "strict scrutiny" do not appear in that opinion. And their odd reliance on the decision holding gerrymandering claims non-justiciable, *Rucho v Common Cause*, 139 S Ct 2484; 204 L Ed 2d 931 (2019), overlooks that *Rucho* rejected a strict-scrutiny standard en route to that conclusion. See *id.* at 2503–04.

And Plaintiffs' proposed standard is unworkable. A world in which "there is no *de minimis*, tolerable, or acceptable level of vote dilution in a redistricting plan" is one in which all notions of sound redistricting would be sacrificed on the altar of ideal numbers. Br. 33. Plaintiffs have not presented a plan achieving zero deviation from ideal measures, so it would be subject to strict scrutiny by their own arguments. And, because many different measures of fairness exist, a deviation from ideal measures on one to achieve zero on another would

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condemn the plan. Further, even subtle shifts in voting patterns over a decade would invite lawsuits—rewarded with strict scrutiny—from voters who feel "packed" in districts with more likeminded voters than necessary to elect their candidate of choice. This is one of many reasons why courts have not subjected election laws to strict scrutiny based on minor or incidental burdens on the right to vote.

2. The Standard of Deference Is Not Germane and, in Any Event, Favors the Commission's Discretion

Plaintiffs also devote much space to downplaying any claim to "deference" by the Commission. Br. 19–24. Their arguments are unavailing.

a. As an initial matter, it is doubtful the debate matters in this case. As shown above, a *de novo* review of the constitutional text, structure, and history yields a standard permitting small deviations from ideal partisan-fairness measures, and that reading stands endorsed implicitly in this Court's decision in *Apportionment of Wayne County*. The Court need not defer to the Commission to see the merit in its position. Further, Plaintiffs admit that the partisan fairness measures the Commission selected are "widely accepted," Br. 1, and their expert, Dr. Warshaw, attests that Dr. Handley correctly calculated the measures. There is not a dispute of fact on these issues and thus no need for this Court to address deference. And, although Plaintiffs challenge the Hickory plan's minor deviations from ideal measures, the Court need not defer to the Commission to see the size of these deviations and to determine that no *disproportionate advantage* exists.

b. That said, there is substantial support in the constitutional text and structure for a deferential standard, at least over some issues. To begin, "the powers granted to the commission are legislative functions," Const 1963 art 4, § 6(22), and "it is too well settled to require citation that a statute must be treated with the deference due to a deliberate action of a coordinate branch of . . . State government." *Bonner v City of Brighton*, 495 Mich 209, 240;

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848 NW2d 380 (2014) (footnote and edit marks omitted). There is, then, no merit to Plaintiffs' position that a presumption of constitutionality does not apply. Br. 23–24. Their argument that a "*plan*" is "not a statute" overlooks the first sentence of the case they cite, which calls the challenged redistricting plan a "statute." See *LeRoux v Secretary of State*, 465 Mich 594, 595, 607–14; 640 NW2d 849 (2002).[10]

c. The Constitution also affords broad discretion to the Commission in conducting its internal affairs, calling for discretion over any disputes touching that topic. The constitutional text provides that the "commission has the sole power to make its own rules of procedure," Const 1963 art 4, § 6(4), codifying the traditional justiciability principle that "[r]ules of legislative procedure . . . will not be reviewed by the courts," *Anderson v Atwood*, 273 Mich 316, 319; 262 NW 922 (1935). Likewise, a highly deferential standard is implicit in the constitutional grant of "procurement and contracting authority." Const 1963 art 4, § 6(4). As a result, to the extent this case is a stalking horse to challenge the Commission's contracting practices, see Br. 9 n 5, its procedures, see Br. 10, its "approach to" its work, Br. 11, its purported "colossal procedural failure," Br. 8 n 4, its choices regarding timing and deadlines, see Br. 12, its process for addressing criteria, see Br. 42 n 17, and its decisions to adopt (or not adopt) rules, see Br. 12 n 9, Plaintiffs attack the Commission at the apex of its constitutionally granted discretion. *De novo* review would be improper.

d. The Constitution further vests the Commission with latitude to balance the competing redistricting criteria and implement redistricting policy. This entails discretion to

[10] There is no significance to the omission of any discussion—in either direction—regarding the presumption of constitutionality in *LeRoux*. The first question it addressed was whether the plan had been validity enacted, so the presumption of constitutionality had not yet attached. *Id.* at 607–14. The second was whether a prior statute bound the legislature in enacting a new statute (the redistricting plan), which is not a constitutional question, and the Court's discussion confirmed a plan's status as a statute. *Id.* at 614–20.

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choose accepted standards of partisan fairness and determine whether plans before it improperly afford a political party a disproportionate advantage.

The Constitution signals that the Commission "is empowered to exercise judgments concerning how to" balance the competing concerns of redistricting. *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 565; 737 NW2d 476 (2007). This Court's precedents recognize that, although the judiciary maintains primacy in interpreting the Constitution, some constitutional grants of authority—particularly legislative—empower another branch of government to make decisions, and this Court "defer[s] to this judgment." *Id.* For that reason, courts "cannot review legislative discretion and declare" legislative choices "arbitrary simply because they differ with the Legislature." *In re Phillips*, 305 Mich 636; 9 NW2d 872 (1943); *Mich & Vicinity Conference Bd v Enterprise Foundry Co*, 321 Mich 265, 271; 32 NW2d 515(1948) (recognizing that "legislative discretion . . . is not subject to judicial review unless it clearly appears to have been exercised arbitrarily and without any show of good reason").

As applied to Subsection 13, these principles support the application of a discretionary standard to the Commission's choices concerning partisan fairness. Because "a rigid reading" of any one criterion would render others "meaningless," *Apportionment of Wayne Co*, 413 Mich at 259, and because the criteria of Subsection 13 employ flexible, not rigid, verbiage, "a legislative body must balance" these factors. *Vesilind*, 295 Va at 448. That body is the Commission. Numerous precedents call for "deference" to the "value judgment[s]" of legislative bodies in redistricting—including in their implementation of strict and mandatory criteria. See, e.g., *id.* (reading mandatory constitutional compactness criterion in this way); *Bonneville Co v Ysursa*, 142 Idaho 464, 472; 129 P3d 1213 (2005) (deferring to redistricting commission's choices in implementing mandatory county-split criterion); *Shaw v Hunt*, 517 US 899, 917, n 9, 116 S Ct 1894; 135 L Ed 2d 207 (1996) ("States retain broad discretion in drawing districts to comply

with the mandate of § 2" of the Voting Rights Act); *Ariz Minority Coalition for Fair Redistricting v Ariz Indep Redistricting Comm*, 220 Ariz 587, 600; 208 P3d 676 (2009). The Court therefore should view the Commission as responsible "to determine the relative level of" partisan fairness necessary "in the first instance" and review that determination "to ensure that [it is] not 'clearly erroneous, arbitrary, or wholly unwarranted.'" *Vesilind*, 295 Va at 446 (citation omitted).

Plaintiffs' contrary position ignores that this Court "simply cannot micromanage all the difficult steps the Commission must take in performing the high-wire act that is legislative district drawing." *Bonneville Co*, 142 Idaho at 472. It also ignores how intertwined the Commission's goals under Subsection 13(d) are with other goals, which have "substantial political consequences," *Gaffney*, 412 US at 753. Plaintiffs use Subsection 13(d) to indirectly challenge the Commission's choices in recognizing communities of interest. See Br. 42 n 17. They ask the Court to judge the Commission against a map the Commission chose not to adopt, which makes discretionary choices the Commission rejected, such as splitting Flint four ways. See *supra* Statement of Facts. Except through the traditional discretionary standard applied to legislative redistricting choices, this Court has no way to distill a *de novo* challenge under one criterion from a *de novo* review of every redistricting choice. Plaintiffs here demand review of the entire course of the Commission's proceedings.

The resulting procedure would upset the Constitution's careful balance of authority. The Constitution shields the Commission from the other branches of government, declaring that the body is "not subject to the control or approval of the legislature," that its powers "are exclusively reserved to the commission," and that "[n]o 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). The text is explicit that "[i]n no event shall any [other]

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body . . . promulgate and adopt a redistricting plan or plans for this state." *Id.* art 4, § 6(19). A *de novo* standard would unsettle that clean division of power by permitting this Court to direct the Commission in all aspects. Because the Commission's policy considerations are limited to those identified in Subsection 13, a *de novo* review of those standards would divest those considerations from the Commission's purview and redirect them to this Court, leaving no considerations for the Commission's own judgment. But the Constitution impliedly rejects the notion that the Commission's proceedings are a mere dress rehearsal for litigation, where the main redistricting events occur and most important choices are made.

There is no justification for *de novo* review in the individual commissioners' lack of "expertise or experience in redistricting." Br. 22. The commissioner-selection process is a feature of the Constitution, not a bug. The Sixth Circuit found it serves "Michigan's compelling interest in cleansing its redistricting process of partisan influence." *Daunt v Benson*, 999 F3d at 310; see also *Daunt v Benson*, 956 F3d at 409 (same). It is difficult to see why the Constitution would go through so much trouble to create an elaborate commissioner-selection process only to deny the commissioners chosen the ability to make "the sort of policy judgments for which courts are, at best, ill suited." *Perry v Perez*, 565 US 388, 393; 132 S Ct. 934 941; 181 L Ed 2d 900 (2012).

Likewise, the Constitution establishes a carefully calibrated framework for the vote and adoption of plans, requiring bipartisan support for any enacted plan. Const 1963, art 6, § 14. This balance of power protects against the threat of special interests hijacking the Commission for their ends. Permitting those same interests to utilize the litigation process risks frustrating that purpose. Here, Plaintiffs allege that a plan receiving every Democratic vote on the Commission is insufficiently protective of Democratic partisan interests and ask this Court to put a heavy thumb on the scale of a map proposed by a special interest group at the

remedial phase. Br. 36–37. There is little reason to believe the Constitution's calibrated balance of power has not already provided sufficient protection to the interests asserted in this case and every reason for concern that Plaintiffs' claim, if successful, would afford those interests more than what is fair from a partisan point of view. And, even if "[c]ourts readily and repeatedly applied" partisan-fairness measures, Br. 23, their judgment is no substitute for the Commission's in ascertaining how far deviations from perfection are appropriate and what competing choices should and should not be implemented and to what degree.

To be clear, none of this is to suggest this Court lacks a role in reviewing the Commission's work. But, in reviewing the balance of factors under Subsection 13(d), a deferential standard is more consistent with the constitutional text than a *de novo* and plenary review of the Commission's redistricting process and choices.

3. Plaintiffs Misread the Advice the Commission Received

There is no persuasive force to Plaintiffs' repeated emphasis on the alleged advice its lawyer and expert allegedly gave to achieve *zero* deviation from perfect measures. It is difficult to follow Plaintiffs' insistence that the Court not defer to the Commission and yet defer to the Commission's lawyer and expert. In any event, Plaintiffs misread the record. Dr. Handley and Ms. Pastula never advised the Commission that a "zero" deviation was legally required. Dr. Handley advised the Commission to focus on "the size of the difference" from ideal measures, and Ms. Pastula explained that "the further from zero on either direction is what the Commission wants to be sensitive to." Def. App. 156a. Dr. Handley answered a Commissioner's question—"Is zero possible?"—by explaining that it is "possible" in a vacuum, but "[i]t might not be possible if you have a whole lot of other criteria that you want to consider." *Id.* She explained "you've got other concerns here to deal with so I'm not saying you

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could do that here." *Id*. Plaintiffs' effort to find a strict command of zero deviation from this exchange stretches the discussion beyond its obvious and clear meaning.

C. The Evidence Establishes That the Hickory Plan Complies With the Constitution

1. The Commission Avoided Any Disproportionate Advantage

The evidence before the Court shows that the Commission satisfied its duty to enact a State House plan that does not provide "disproportionate advantage." Const 1963, art 6, § 13(d). The challenge confronting the Commission is that ideal partisan-fairness measures are rarely achieved without effort. Because "Democrats tend to live close together in urban areas, whereas Republican tend to disperse into suburban and rural areas," achieving an ideal votes-to-seats result—whereby the parties receive the same (or a symmetrical) proportion of legislative seats as votes—requires "the two dominant parties to create a 'bipartisan' gerrymander" to overcome the natural geographic disadvantage the Democratic Party experiences from geographic representation. *Johnson v Wis Elections Comm*, 399 Wis 2d 623, 653; 967 NW2d 469 (2021). This is true in Michigan, as the League of Women Voters' expert in last decade's redistricting litigation, Dr. Chen, has found. Def. App. 023a (citing Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8(3) Quarterly Journal of Political Science, at 239–69 (2013)).

To avoid providing an unintentional disproportionate advantage to the Democratic Party, the Commission made districting decisions by reference to accepted measures of partisan fairness and with a goal of reducing naturally occurring pro-Republican districts closer to even. As recounted, the Commission hired an expert, reviewed draft plans against the metrics she recommended, and made changes for the benefit of Democratic Party voting strength to counteract the effects of natural geography. This involved, for example, splitting Detroit and Wayne County into multiple districts to spread Democratic voters across more districts than

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would have likely occurred in an effort blind to partisan data. These moves have drawn criticisms, including from residents of Wayne County and litigants before this Court, but they were critical to the Commission's goals under Subsection 13(d). The Commission ultimately satisfied Subsection 13(d) because the partisan-fairness scores of the Hickory plan fall well within the accepted range of scores according to those measures.

2. Plaintiffs Fail To Establish a Constitutional Violation

Plaintiffs' efforts to prove a violation of Subsection 13(d) fall flat.

a. The PTV Plan

Plaintiffs contend that the PTV plan shows it is possible to "produce a much fairer plan than the Adopted Plan." Br. 41. The PTV plan, in fact, supports the Commission's position.

First, the PTV plan demonstrates that the Republican geographic advantage is formidable and that reducing measures to zero is not possible in conformity with any party's notion of the Subsection 13 requirements. The PTV plan does not achieve zero deviation from the ideal in a single measure of Dr. Warshaw's report, and by every measure, it exhibits (like the Hickory plan) a slight Republican bias. Warshaw Rep. 12–15. As measured by Dr. Warshaw's collection of 2012–2020 State House results, the PTV plan is more pro-Republican than 77% of previous state house plans from around the nation over the past 50 years on the efficiency-gap measure, 76% on the mean-median measure, 72% on the symmetry-bias measure, and 76% on the declination measure. Warshaw Rep. 14. This fact alone confirms that the Commission cannot achieve zero bias without "obliterating many traditional redistricting criteria mandated" by Subsection 13. *Johnson*, 399 Wis 2d at 653. In any event, Plaintiffs fail to explain how they can contend that "a 0% Efficiency Gap" is "the goal," when their plan clearly fails their own standard of "exhibiting no partisan bias." Br. 1.

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Second, the differences between the PTV plan and the Hickory plan are *de minimis* and the PTV plan therefore cannot establish a *disproportionate advantage*. The clearest evidence of this is shown in Dr. Warshaw's estimates of partisan-fairness measures using the past decade's State House elections. Because those contests are for the same office as the challenged plan (the State House), they are known in redistricting litigation as "endogenous" elections, and they are the most probative evidence for predicting future results in State House elections. E.g., *Bone Shirt v Hazeltine*, 461 F3d 1011, 1020–21 (CA 8, 2006); *Johnson v Hamrick*, 196 F3d 1216, 1222 (CA 11, 1999). Calculated by these elections, the measures exhibit only minor differences, even no difference, between the two plans:

Measure	Hickory Plan	PTV Plan
Democratic seat share on 52% vote share	49%	49%
EG	Pro Republican 4.6%	Pro Republican 4.4%
Mean-Median	Pro Republican 3.0%	Pro Republican 2.8%
Symmetry Bias	Pro Republican 4.7%	Pro Republican 3.8%
Declination	Pro Republican 28.2%	Pro Republican 29.6%

Warshaw Rep. 14. Given the inherent imprecision in predicting future election outcomes, to read this as anything but a virtual tie would read too much into these *de minimis* differences.

When calculated by Dr. Warshaw's statewide-election composite, the difference is only slightly larger:

Measure	Hickory Plan	PTV Plan
Democratic seat share on 52% vote share	50%	53%
EG	Pro Republican 1.1%	Pro Republican 4.1%
Mean-Median	Pro Republican 2.9%	Pro Republican 2.5%
Symmetry Bias	Pro Republican 7.4%	Pro Republican 4.6%
Declination	Pro Republican 31.1%	Pro Republican 17.2%

These differences, too, are small and should be considered *de minimis*. And, in all events, statewide elections are exogenous races and are "not as probative as endogenous elections." *Luna v Co of Kern*, 291 F Supp 3d 1088, 1120 (ED Cal 2018).

Likewise, Dr. Warshaw's comparison with prior maps on a nationwide basis shows commonality between the plans, not meaningful difference:

Measure	**> Pro-Rep. than this % of elections Hickory Plan**	**> Pro-Rep. than this % of elections PTV Plan**
EG (State House)	77%	77%
Mean-Median (State House)	76%	75%
Symmetry Bias (State House)	72%	68%
Declination (State House)	76%	78%
EG (Statewide Composite)	76%	61%
Mean-Median (Statewide Composite)	76%	74%
Symmetry Bias (Statewide Composite)	84%	72%
Declination (Statewide Composite)	76%	74%

The other differences measured in Dr. Warshaw's report are similarly minor. Dr. Warshaw contends that the website PlanScore shows that the Hickory plan's measures favor Republican prospects in an average of 99% of contests, but the number is 90% for the PTV plan. Warshaw 15. He asserts that the Hickory plan is more biased than 54% of historical elections, but the number is 51% for the PTV plan. Warshaw 14. And, in measuring district compactness according to statewide averages, Dr. Warshaw finds that "the two plans look very similar." Warshaw 17.

Third, even if the differences between the plans were large, the PTV plan still would fail to establish a disproportionate advantage because it does not achieve the Commission's

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goals, including its communities-of-interest goals. The Commission purposefully avoided splitting Flint in response to public comments, but the PTV plan splits it four ways. The Commission grouped a Chaldean community into districts, but the PTV plan splits this community. Because of the Commission's broad discretion in preparing maps to reflect communities of interest, and because the communities-of-interest criterion ranks ahead of Subsection 13(d) in priority, it is untenable for Plaintiffs to assert disproportionate advantage from a map conflicting with the Commission's legitimate goals.

Importantly, Plaintiffs do not argue that the PTV plan meets the Commission's communities-of-interests goals but instead directly attack the Commission's approach to communities of interest, faulting it for not adopting a "systematic" definition of communities. Br. 42 n.17. But, even if the Commission were not entitled to wide latitude in defining and protecting communities of interest, Plaintiffs' position has no constitutional basis. Nothing in Subsection 13 (or anywhere) commands the Commission to adopt a "systematic" definition of communities. The text of Subsection 13(c) militates against that view by defining communities of interest in sweeping terms: "Communities of interest may include, but shall not be limited to, populations that share cultural or historical characteristics or economic interests." Const 1963 art 4, § 6(13)(c). The wide range of possible communities in no way suggesting a cabining of the Commission's discretion to some rigid standard or set of standards. Further, the Constitution contemplates that the Commission will identify communities of interest in the extensive and lengthy process of hearings and public comments. To require the Commission to define its communities systematically would have the effect of plugging its ears to the innumerable comments reflecting idiosyncratic local needs that do not neatly fit the cookie-cutter rules Plaintiffs would demand. They offer no argument from the constitutional test, history,

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or even common sense to the contrary, and their attack on the Commission in this respect only exposes the structural flaws in their entire case.

The PTV plan also demonstrates the futility of Plaintiffs' legal theory. If an enacted redistricting plan with a 4.6% efficiency gap can be tossed out on the basis of a plan with a 4.4% efficiency gap, then no plan of the Commission is safe. If the Court were to order the Commission to achieve a 4.4% efficiency gap as a remedy, another set of plaintiffs would have a legal right to strike it down with a plan achieving a 4.2% efficiency gap. There is no limiting principle on this theory, other than perfection not required by Subsection 13(d).

b. The Commission's Process

Plaintiffs cast various criticisms at the Commission's subjective consideration of partisan-fairness measures during the redistricting process. Their arguments are neither relevant nor correct.

Plaintiffs fail to connect any purported failing by the Commission to an objective problem in the Hickory plan. Plaintiffs disparage the credentials of Dr. Handley, insisting that her expertise is limited to issues under the Voting Rights Act, Br. 6–9, but their expert, Dr. Warshaw, attests that his "estimates of the partisan bias in the Hickory plan . . . are not significantly different from the assessment of the Commission's analyst, Dr. Handley," Warshaw Rep. 4 n.6. Obviously, she was qualified to run the metrics. Plaintiffs also insist that an "expert with the requisite experience and expertise in measuring partisan fairness would have presented information to the ICRC on *all* the commonly-accepted methods of measurement of this critical, objective factor." Br. 8 n.4. But Plaintiffs do not identify any measure Dr. Handley should have considered, they fail to show that the analysis would have been different if such a measure had been consulted, and, again, Dr. Handley's measures are not significantly different from Dr. Warshaw's. Plaintiffs criticize members of the Commission for using a

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website called PlanScore to assess partisan fairness, Br. 10, but their own expert uses PlanScore in his expert report, Warshaw Rep. 15. Ultimately, Plaintiffs contend that Dr. Handley's advice (or their misreading of it) was correct and that the Commission failed to heed it, not that Dr. Handley led the Commission astray through incompetence. The same can be said of Plaintiffs' ire against Ms. Pastula.

It is also difficult to follow Plaintiffs' other process-based assertions, which lack both legal relevance and logical coherence. Plaintiffs repeatedly fault the Commission for not having taken certain actions until a number of months "after the ICRC convened." Br. 6. But this is irrelevant. All the actions Plaintiffs cite occurred long before the census results were released and before any plans could be drawn. See Br. 6 (admitting Ms. Pastula gave an overview of partisan fairness in February 2021, six months before the census results were released); Br. 6–7 (admitting relevant advice was given and actions were taken in June 2021, two months before map-drawing could begin). Plaintiffs cite no legal deadline governing any of these actions, and the Commission's taking them well in advance of map-drawing is evidence of diligence, not negligence.

Plaintiffs next fault the Commission for moving *too fast* in drafting and enacting plans pursuant to a "self-imposed deadline." Br. 12. But the deadline for enacting plans is *not* "self-imposed." The Constitution demands that maps be enacted "[n]ot later than November 1." Const 1963 art 4, § 6(7). The Commission only adopted a *later* date because it was impossible to meet the November 1 deadline given the delayed census results and the numerous mandates within the Constitution to *take* time in various activities, such as by conducting at least five hearings after maps are drafted, *id.* § 9, and posting plans for a 45-day public-comment period, *id.* § 14(b). The Commission worked quickly to mitigate the harms of failing to meet the November 1 deadline and imposed a back-up deadline to avoid the risk of impasse

litigation and federal-court-drawn redistricting plans. *Branch v Smith*, 538 US 254, 275; 123 S Ct 1429; 155 L Ed.2d 407 (2003) (discussing the rules applicable when state instrumentalities fail to redistrict).

Plaintiffs do not establish that the Commission's efficiency hampered its ability to consider partisan fairness. In fact, they criticize the Commission for its effort "to *lower* the partisan fairness measures" in draft plans. Br. 13; see also Br. 12 (criticizing commissioners for working "to correct" plans). This describes what the Commission is supposed to do: avoid a disproportionate advantage. It is a complete mystery why Plaintiffs believe they can prove the Commission failed to discharge its duty through assertions that it worked diligently to discharge its duty. None of this amounts to "unforced errors." Br. 12.

The record, in fact, demonstrates that the Commission did yeoman's work in perhaps the most difficult redistricting cycle ever. The Commission hired qualified advisors, achieved a myriad of goals, drew plans receiving broad support on the Commission, enacted *every plan* through the favored process of Subsection 14(b) with support of at least two members of every constituency on the Commission, enacted the Hickory plan with only two votes going to other plans, and did all this—while honoring the time-consuming hearing and comment procedures—in time for its plans to be used in the 2022 elections. And the Commissioners, who were selected because they are not politicians and lack legislative experience, performed this complex lawmaking task for the first time under a new constitutional framework. In the process, the Commission enacted a State House plan that does not afford a disproportionate advantage to any political party by any meaningful metric.

II. The Hickory Plan Does Not Violate Any Other Provision of the State Constitution

Plaintiffs also contend that the Hickory plan contravenes the fundamental rights of free speech and association and the Purity of Elections Clause. Br. 34–36. As an initial matter,

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there is little plausibility in these assertions. For generations "redistricting in Michigan was accomplished through a legislative process," and this "facilitated gerrymandering." Liscombe & Rucker, supra, at 18–19. A federal court found that the Republican-controlled legislature in 2011 "deliberately dr[e]w Michigan's legislative districts to maximize Republican advantage and, consequently, disadvantage Democratic voters, Democratic candidates, and the Democratic Party." *Benson*, 373 F Supp 3d at 883. The League of Women Voters did not challenge that plan in state court under any provision of the State Constitution, and the voters amended the Constitution to "reject[] the traditional method of partisan redistricting . . . ." *In re Indep. Citizens Redistricting Comm*, 507 Mich at 1025 (WELCH, J., concurring).

The gravamen of Plaintiffs' argument here is the entire amendment program was unnecessary because gerrymandering was prohibited all along and, what's more, even a plan like the Hickory plan that is *not alleged to be the product of gerrymandering* violates these provisions if it does not achieve perfect partisan symmetry. The very fact that Michigan voters overwhelmingly chose to reject gerrymandering through Proposal 18-2 proves that "the great mass of the people," *In re Proposal C*, 384 Mich at 405, did not understand gerrymandering to be already prohibited in the State Constitution. The Constitution certainly did not already provide stricter standards than those codified in Subsection 13(d).

A. Plaintiffs' Free Speech and Association Claims Fail

The Hickory plan does not violate Article 1, Sections 3 and 5 of the State Constitution, which guarantee rights of speech and assembly. As Plaintiffs acknowledge, these rights are "coextensive with those under the First Amendment to the U.S. Constitution." Br. 34; see also *Thomas M. Cooley Law Sch v Doe 1*, 300 Mich App 245, 256; 833 NW2d 331 (2013); *In re Contempt of Dudzinski*, 257 Mich App 96, 100; 667 NW2d 68, 72 (2003) (same). The Hickory plan does not even implicate these rights because it does not regulate speech or assembly and

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places no cognizable burden on the exercise of these rights. The U.S. Supreme Court has explained that a redistricting plan does not trigger any standard of free-speech scrutiny because "there are no restrictions on speech, association, or any other [expressive] activities . . . . The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district." *Rucho*, 139 S Ct at 2504. Free-speech and association guarantees do not prohibit even gross gerrymandering. See also *Vieth v Jubelirer*, 541 US 267, 294; 124 S Ct 1769; 158 L Ed 2d 546 (2004) (plurality opinion).

These guarantees certainly do not require that redistricting plans affirmatively achieve ideal measures of partisan fairness. Even if speech or assembly could be burdened in a redistricting plan, the guarantees of free speech and assembly prohibit only intentional efforts to regulate or retaliate against individuals for the exercise of these rights. "Subjective motivation appropriately enters the picture on a retaliation claim because [the] concern is with actions by public officials taken with the intent to deter the rights to free expression guaranteed under the First Amendment." *King v Zamiara*, 680 F3d 686, 695 (CA 6, 2012); see *also AbdulSalaam v Franklin Co Bd of Comm'rs*, 399 F App'x 62, 65 (CA 6, 2010) (requiring "evidence in support of the necessary 'intent' element" for a "First Amendment retaliation" claim); *Bloch v Ribar*, 156 F3d 673, 681–82 (CA 6, 1998) (recognizing that "an act taken in retaliation for the exercise of a constitutionally protected right is actionable…even if the act, when taken for a different reason, would have been proper."). Those federal courts that found gerrymandering claims justiciable before *Rucho* required plaintiffs to allege and prove "the specific intent to burden individuals or entities that support a disfavored candidate or political party." *Benson*, 373 F Supp at 913. Plaintiffs allege nothing like that here.[11] Nor would any such allegation be colorable, when every Democratic member of the Commission voted for the Hickory plan.

[11] Plaintiffs' effort to avoid that showing by citing the U.S. Supreme Court's *Gaffney* decision is unavailing. Br. 35. The case did not address specific intent to burden disfavored speech and

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Any other rule would be unworkable. It would contravene the rule that free-speech and association guarantees provide no right to government *assistance* for private individuals to exercise these rights, such as by creating of an "audience for their views." *Minn State Bd for Community Colleges v Knight*, 465 US 271, 282; 104 S Ct 1058; 79 L Ed 2d 299 (1984). It would also place the rights of all Michigan residence in hopeless conflict. Each one of them enjoys the same right to speech and association, but reading that right to encompass redistricting plans designed to ensure each citizen has an ideal opportunity to speak and associate within districts would be impossible. See *Johnson*, 399 Wis. 2d at 654. And any such standard that might be inferred in the rights of speech and association could not plausibly be any more robust than the explicit standard of Subsection 13(d), which the Hickory plan satisfies.

B. Plaintiffs' Purity of Elections Clause Claim Fails

Plaintiffs' claim under the Purity of Elections Clause also adds nothing to this case. To begin, it is doubtful whether the Purity of Elections Clause even applies. The Clause is framed as a command on the State Legislature: "the legislature shall enact laws . . . to preserve the purity of elections." Const 1963, art 2, § 4. Under this Clause, "the Legislature has been specifically commanded by the people of Michigan to preserve the purity of elections" and "to guard against abuses of the elective franchise." *In re Request for Advisory Opinion*, 479 Mich at 17 (citation and quotation marks omitted). But the Commission is "not subject to the control or approval of the legislature," Const 1963, art 4, § 6, and the role of the Clause in granting generic election-regulation powers to the state legislature is unclear at best.

In any event, the Hickory plan complies with any standard under the Purity of Elections Clause that might reach this case. As noted, the predominant thrust of the Clause is establishing a duty on the legislature's part to preserve purity in election, such as through laws

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association and, in fact, held that partisan intent in redistricting does not violate the U.S. Constitution. 412 US at 748–49.

limiting "voter fraud." *In re Request for Advisory Opinion*, 479 Mich at 36; *Gracey v Grosse Pointe Farms Clerk*, 182 Mich App 193, 205; 452 NW2d 471(1989). The Commission has discharged any such duty by enacting redistricting plans to facilitate orderly administration of elections and thereby to administer the right to vote of every citizen in this State.

The Clause has also been read to set outer limits on the legislature's prerogative in "one candidate or nominee an unfair advantage over rival candidates or nominees." *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 693; 662 NW2d 804, 817 (2003); see also *Socialist Workers Party v Secretary of State*, 412 Mich 571, 598–99; 317 NW2d 1, 11 (1982) (recognizing the "touchstone" for analyzing violations of the Clause "is whether the election procedure created affords an unfair advantage to one party or its candidates over a rival party or its candidates."). But that prohibition does not prohibit election laws that are "facially nondiscriminatory and appl[y] equally to all voters." *League of Women Voters of Mich v Secretary of State*, 333 Mich App 1, 26; 959 NW2d 1, 15 (2020), appeal denied, 506 Mich 886, 946 N.W.2d 307 (2020), reconsideration denied, 506 Mich. 905, 948 N.W.2d 70 (2020). For example, the Court of Appeals has recognized that a facially non-discriminatory ballot receipt deadline does not violate the Clause, even though "mail may be processed more expeditiously in some areas and less expeditiously in others." *Id.* So too here. There is no allegation that the Commission singled out disfavored voters or candidates, and the Purity of Elections Clause cannot plausibly be read to contain even stricter fairness standards than those enumerated in Subsection 13(d).

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III. The Commission's Position Regarding Procedure

This case may raise several procedural questions. The Commission's positions are as follows:

A. The Court should resolve this case on the record before it, as it resolved the matter *Detroit Caucus v Independent Citizens Redistricting Comm*, No. 163926. Although the Court there recognized that evidentiary proceedings before a special master may be necessary in some cases, the plaintiffs in that case expressed "no intention of further supplementing the record," and the parties in effect agreed that the record as constituted at the time of briefing under MCR 7.306(J) was adequate. Likewise, in this case, Plaintiffs have presented their evidence and signaled in their brief (16–18) that the case should be resolved on the record as it now standards. Indeed, there is no apparent dispute of material fact. The parties agree on the partisan-fairness metrics, the experts for the sides have reached materially similar conclusions, and the question of how far a deviation from zero is legally acceptable is a pure question of law for the Court.

B. Plaintiffs raise the issue of remedial proceedings, which the Court need not address if it agrees with the Commission that the Hickory plan complies with the Constitution. If the Court rules against the Commission, the Constitution is clear that it "shall remand a plan to the commission for further action" and that it may not craft a remedial plan of its own. Const 1963, art 4, § 6(19).

Plaintiffs appear to concede this clear rule, Br. 37, but they devote several pages to "the history and interpretation of [Subsection 19's] 1963 doppelganger." Br. 38. It is unclear what authority, precisely, Plaintiffs are advocating this Court claim for itself, but there is no room for Plaintiffs to contend that the Court may adopt a map or compel the Commission to adopt a specific plan. The text of Subsection 19 is unambiguous on this point, and the 1963 provision

and current provision are not the same. The operative provision includes the extra limitations from the sentence stating "[i]n 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." Moreover, case law history is only relevant when it reveals a "settled judicial construction." *Richardson v Hare*, 381 Mich 304, 311; 160 NW2d 883(1968). None of the cases Plaintiffs cite (at 38–39) were decided after 1963, and they do not interpret or construe the 1963 provision. See Br. 38 (citing cases from 1960, 1957, 1944, 1914, 1906, and 1892). Their arguments are as off base as they are unclear.

Plaintiffs seem concerned with establishing the proposition that the Commission *may*, if it *chooses*, enact the PTV plan as law. See Br. 41. But that legal proposition is not in dispute. Nothing in the Constitution prevents the Commission from enacting as law a plan submitted by interested citizens. But Plaintiffs seemingly forget that commissioners have good political and policy reasons not to adopt the PTV plan or any other plan submitted by special interest groups. Just as members of this Court presumably do not normally copy and paste the briefs of the lawyers whose clients prevail as the Court's opinion—even though the Constitution does not prohibit this—many commissioners have signaled that they view it as their duty to all 10 million Michiganders to prepare the plans the Commission adopts and not simply to take the plans of special interest groups as the Commission's own. The Commission remains free to change its mind, and Plaintiffs remain free (if there is a remand) to advocate that it do so. But asking this Court to advocate for the PTV plan or somehow place a heavy thumb on the scales in its favor is improper.

C. Plaintiffs acknowledge that, "[w]ith the April 19, 2022 filing deadline approaching, there is little time" for a remedial proceeding before the 2022 election period, and the Commission's mandatory procedures for enacting a plan—including the 45-day notice

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period—may impair its ability to craft a remedy in time to administer the elections. Under these circumstances, the Court should order that the Hickory plan govern the 2022 elections in all events and reserve any remand for crafting a plan for use in following elections.

Election cases implicate 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 Accts, 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. One is that 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. Another is the impendency of the candidate-filing deadline. Yet another is that the Commission appears to be required in crafting a remedial plan to adhere to various procedural requirements governing the enactment of any plan, 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). The changes Plaintiffs seek are not "feasible without significant cost, confusion, and hardship." *Merrill v Milligan*, 595 US -- (2022) (slip op at 5) (KAVANAUGH, J, concurring).

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The Court should also consider the public's overriding interest in voting in elections governed by plans established by the Commission. Even if the Court concludes that the Commission's plan falls short, 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*, 377 US at 585. 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 2 a(c); *Branch*, 538 US at 275.

To be sure, the Commission would vehemently oppose any such outcome in a future federal proceeding. But 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 partisan-fairness 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.

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CONCLUSION

The Court should deny all requested relief.

Dated: February 9, 2022

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 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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