**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

DONALD AGEE, JR., an individual, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case No. 1:22-cv-00272

**Three-Judge Panel Appointed Pursuant to 28 U.S.C. § 2284(a)**

**ORAL ARGUMENT REQUESTED**

# PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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## I. INTRODUCTION

The Commission Defendants used racial quotas (40% BVAP caps) to draw the Linden and Hickory maps, cracking Metro Detroit's Black voters into baconmandered districts and diluting their ability to elect candidates of their choice due to a proven lack of white-crossover voting. Plaintiffs are entitled to summary judgment.

## II. ARGUMENT

### A. Summary judgment is appropriate.

The Commission wrongly claims that Plaintiffs haven't argued the summary-judgment standard. Comm'n.Resp.Br.1,3, PageID.1639,1641. Plaintiffs' summary judgment papers all explain that Plaintiffs are entitled to a declaration that the Commission's Hickory and Linden plans violate the VRA and the Equal Protection Clause as a matter of law because no genuine issue of material fact exists.

The Commission also asserts that Plaintiffs fail to cite any case awarding summary judgment to a VRA-plaintiff on the *Gingles* preconditions, suggesting this would be the first. Comm'n.Resp.Br.3-4, PageID.1641-42. Not so. In *Pope v. Cnty. of Albany*, No. 1:11-CV-0736, 2014 WL 316703, at *13 (N.D.N.Y. Jan. 28, 2014) (Ex.A), the court granted partial summary judgment to plaintiffs on *Gingles 1*. Pls'.SJ.Br.13, 18-20, PageID.594, 599-601. And there are several others. *E.g.*, *United States v. Charleston Cnty.*, 318 F. Supp. 2d 302, 313 (D.S.C. 2002), *aff'd*, 365 F.3d 341 (4th Cir. 2004) (granting plaintiffs summary judgment on all three *Gingles* preconditions); *Rose v. Raffensperger*, 584 F. Supp. 3d 1278, 1292-95 (N.D. Ga. 2022) (same). Defendants' assertion that summary judgment is rarely granted is irrelevant; it should be granted here.

### B. Summary judgment is proper as to Counts I and II because the baconmandered districts deny Plaintiffs their protected right under the VRA to elect their candidate of choice.

The Commission says that Dr. Handley's report established their good-faith belief "that all the *Gingles* preconditions are met." Comm'n.Resp.Br.33, PageID1671 (cleaned up). For this, they are correct.

#### 1. Plaintiffs are entitled to summary judgment on the first *Gingles* precondition.

The Detroit area contains one of the largest, most compact, Black populations in America and for decades, its VRA-protected political boundaries included plentiful majority-minority districts. Pls'.SJ.Br.2-4, 32-35, PageID.583-85, 613-16. That's why the Commission hired a VRA expert who opined that "districts that provide minority voters with an opportunity to elect their candidates of choice must be drawn" or "maintained." 2021.Handley.Report.17, J.A.17. And it is why the Commission began drawing maps for the Detroit area with BVAPs around 50% until "the Commission's counsel intervened" and forced the Commission to adopt 40% BVAP caps in many districts. Szetela.Dissenting.Report.5, J.A.608.

The Commission nevertheless argues that Plaintiffs cannot establish the first *Gingles* precondition of numerosity and compactness. Comm'n.Resp.Br.4-9, PageID.1642-47. But the Commission's arguments are contrary to precedent, irrelevant to the liability phase of this proceeding, and seek to graft hyper-technical remedial considerations into the *Gingles* landscape. Plaintiffs have shown that the Detroit area's Black population is sufficiently large and geographically compact to draw more majority-minority districts than the Linden (0) and Hickory (6) plans.

Pls'.SJ.Br.10-13, PageID.591-94. The Commission cannot dispute this, so, Plaintiffs are entitled to summary judgment on the first *Gingles* precondition.

That's the forest. Now the trees. The Commission's primary argument is that Plaintiffs' demonstration maps—which leave predominately Black communities intact and contain higher BVAPs—will not lead to more Black electoral opportunity. Comm'n.Resp.Br.4-5, PageID.1642-43. If that argument sounds counter-intuitive, that's because it is. It is also contradicted by the Commission's VRA legal counsel, Bruce Adelson, who advised that the higher the BVAP, "the greater the opportunity for minority voters to be able to elect candidates of choice." MICRC_4871-72, Ex.B.

Moreover, the Court need not address performance questions at this stage because Plaintiffs' demonstration maps were proffered to illustrate liability, not a remedy. As explained in Plaintiffs' second Brief, neither *Abbott v. Perez*, 138 S. Ct. 2305 (2018), nor *Harding v. County of Dallas, Texas*, 948 F.3d 302 (5th Cir. 2020), support the Commission's requested expansion of *Gingles* precondition one, and other courts have rejected this argument outright. Pls'.Resp.Br.8-14, PageID.1582-88 (citations omitted). "[T]he Gingles preconditions are designed to establish liability, and not a remedy[,]" the "court may consider, at the *remedial* stage, what type of remedy is possible ...." *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006) (cleaned up); *accord Missouri State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 934 (8th Cir. 2018) (same).

The Commission's remaining arguments posit that there exist fact questions over whether Plaintiffs' demonstration maps are "reasonably configured."

Comm'n.Resp.Br.4-9, PageID.1642-47. But as Justice Kavanaugh's *Allen v. Milligan* concurrence explains, "a plaintiff 's proposed alternative map and proposed majority-minority district are 'reasonably configured'—namely, by respecting compactness principles and other traditional districting criteria such as county, city, and town lines." 2023 WL 3872517, at *22 (U.S. June 8, 2023) (citations omitted). The Majority, too, discussed how egregious a map must look to be unreasonably configured and found that the alternative maps there were reasonable because they lacked "tentacles, appendages, bizarre shapes, or any other obvious irregularities that would make it difficult to find them sufficiently compact," and they "contained equal populations, were contiguous, and respected existing political subdivisions, such as counties, cities, and towns." *Id.* at *9-10, 13-14.

Mr. Trende's demonstration maps satisfy that standard. They are contiguous, compact, and honor county, city, and town lines—perhaps even more so than the Linden and Hickory plans. Pls'.SJ.Br.11-13, PageID.592-94. And since the Detroit area is home to one of the largest Black populations in the Country, drawing more reasonably configured majority-minority districts than the Commission—i.e., zero and six—is not arduous. The Commission does not really contend otherwise.

The Commission instead faults Mr. Trende's demonstration plans for not adhering to Commissioner Anthony Eid's post-hoc and subjective organization of 200+ Detroit "neighborhoods" he considers to be "communities of interest." Comm'n.Resp.Br.5-7, PageID.1643-45. Mr. Eid claims the Commission's maps—which fracture Black majorities—keep certain Detroit neighborhoods intact while

Mr. Trende's demonstration maps, which re-form Black majorities, split Detroit neighborhoods. *Id.* at Ex. 1. He also says Mr. Trende's maps wrongly combine Detroit neighborhoods that don't have "much in common" or "share similar characteristics" with each other. *Id.* This is not a serious argument.

Mr. Trende's maps do not need to win a community-of-interest "beauty contest"—though they certainly could here, where the Commission's maps gut traditional communities of interest with their long, baconmandered districts that blow through numerous municipal boundaries to combine poor, predominantly Black urban municipalities with wealthy, predominately white suburban municipalities. Lemmons.Aff.¶¶26-28, 31, 33, 34, 37-38, 43-45, J.A.527, 529-531-533; Smith.Aff.¶¶18-19, 27-28, 40-47, J.A.512, 514, 516-17; Lockerbie.Report.¶¶19-45, J.A.285-89 (collecting public comments).[1] The *Milligan Court* held that an alternative map which reasonably addresses communities of interest need not be drawn in accord with the redistricting body's community-of-interest priorities. 2023 WL 3872517, at *10-11.

Here, Mr. Trende's focus on traditional communities of interest as reflected by municipal boundaries presents a more reasonable approach than Mr. Eid's. The Commission had difficulty defining "community of interest," describing the term as "vague," "elastic," "nebulous," and so on. Comm'n.Report.35-39, Ex.E. Former

[1] Two of Mr. Eid's fellow Commissioners filed dissenting reports separate from this litigation criticizing the Commission's failure to properly honor communities of interest near Detroit. Wagner.Dissenting.Report.81-84, Ex.C; Lange.Dissenting.Report.71-81, Ex.D.

Michigan Supreme Court Justice, Stephen Markman, cautioned against such a interminable definition because it creates a "standardless" process; he further explained why the "most obvious and genuine" communities of interest are "counties, cities, and townships." Markman.Memorandum.1-25, Ex.F. Accordingly, Mr. Trende's demonstration maps reasonably account for communities of interest, and Mr. Eid's more fluid approach does not change that result.

The Commission also faults Mr. Trende for not providing a detailed evaluation regarding whether his demonstration plans adversely impact the Commission's partisan-fairness goals. Comm'n.Resp.Br.7, PageID1645. This a curious argument where Democratic candidates in 2022 won all 27 general elections Dr. Handley analyzed in the Detroit area, 2023.Handley.Report.App.B, J.A. 101-07, and Mr. Trende's demonstration maps only entailed boundary shifts in Southeast Michigan, Trende.Report.22-23, 81-82, J.A.329-30, 388-89.

But again, the Court need not dive into the partisan-fairness weeds. Achieving a partisan outcome is not a "traditional redistricting principle" for purposes of determining whether a demonstration map is reasonably configured under *Gingles* precondition one. If it were, VRA § 2 would be subverted, and redistricting bodies could sacrifice VRA compliance in the name of partisan fairness. State election laws yield to the VRA by operation of the Supremacy Clause, and Michigan requires that same restraint. Mich. Const. art. IV, § 6(13)(a) (setting VRA compliance as the Commission's top priority). Thus, it is immaterial whether drawing more majority-

minority districts than the Commission would impact the Commission's partisan fairness goals.

Lastly, the Commission argues that Mr. Trende's demonstration maps are not "reasonably configured" because they may be a product of a predominantly racial intent, namely compliance with the VRA. Comm'n.Resp.Br.7-9, PageID.1645-47. The *Milligan* Court just rejected this same argument. 2023 WL 3872517, at *12, 15-16 (reaffirming that an illustrative map submitted under *Gingles 1* need not be race neutral).

Accordingly, there is no threshold flaw in Mr. Trende's demonstration maps, which satisfy traditional redistricting principles and show that it is possible to draw more majority-minority districts than the Commission. Any nuance regarding the configurations of the replacement maps is properly left to the remedial stage. *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1398–99 (E.D. Wash. 2014) (granting summary judgment in recognition that the law does not require a demonstration map to perfectly harmonize every traditional redistricting criteria) (cleaned up).

**2. Plaintiffs are entitled to summary judgment on the second and third *Gingles* preconditions.**

The Commission purports to offer both a "district-by-district" and "aggregate" approach to showing why it prevails on the second and third *Gingles* preconditions. Neither works.

1. District-by-district

The 2022 primary elections were devastating for Black candidates of choice, particularly in the most probative districts: those pitting Black candidates against

white candidates. Pls'.SJ.Resp.Br.16-27, PageID.1590-1601. Indeed, in the seven most racially polarized elections—HD5, HD6, HD8, HD11, HD12, HD14 and HD26, Black candidates of choice lost five. *Id.* at 27, PageID.1601. And in 8 of the 10 districts with a bi-racial election involving a non-incumbent Black candidate—HD5, HD6, HD8, HD9, HD11, HD12, HD26, and HD31—the non-incumbent Black candidates received no material white-crossover support, contrary to the Commission's hopes. *Id.* Even Black *incumbents* received minimal white-crossover support. *E.g.*, *id.*

The Commission's response is to say that the 2022 election results are not enough; there must be a "pattern" of racially polarized voting. Comm'n.Resp.Br.10, PageID.1648. That's ironic since the Commission relied exclusively on 2022 election results in its opening summary judgment brief. Comm'n.Br.22-24, PageID.659-661. But no matter, here is the historical pattern:

- White voters rejected the preferred Black candidate in the 2018 gubernatorial race, Trende.Report.28-35, J.A.335-342;
- In 2014 House primaries, Black candidates of choice had "close calls," even in "overwhelmingly Black districts, *id.* at 40-41, J.A. 347-48;
- In 2016 open House primaries, Black candidates of choice lost four of six races, including a race in a Black-majority district, *id.* at 41, J.A.348;
- In the 2014 Senate primary, "the white candidate of choice (who earned just 7% of the vote from Black voters) won in a 52.5% BVAP district by just over eight points" due to a fractured Black field, *id.* at 84, J.A.391;
- In that same primary, "the Black candidates' vote shares tend[ed] to mirror the BVAP of the district, running within a few points of each other," *id.* at 86, J.A.393; and
- The 2018 Senate primaries showed racial polarization along the same order of magnitude as the disastrous 2022 primary elections, *id.* at 86-89, J.A.393-96.

Commission experts do not really disagree; that's why the Commission concedes that it "had good reasons to believe the second and third *Gingles* preconditions could be met from the expert report of Dr. Handley, who concluded that Detroit-area voting exhibits sufficient racial polarization that white-bloc voting would usually defeat Black-preferred candidates in the absence of districts drawn to ensure equal Black opportunity." Comm'n.Br.28, PageID.666. The problem is that the Commission failed to draw such districts.

2. Aggregate

The Commission fares no better in the aggregate. The following facts are undisputed. The 2022 primary resulted in a 20% decline in Michigan's Black Legislative Caucus.[2] Pls'.SJBr.32-33, PageID.613-14. There is a 30% proportionality deficit in Black-legislative representation. *Id.* at 34, PageID.614. There is a 65% proportionality deficit in majority-Black legislative districts. *Id.* at 35, PageID.615. And there is a 17% proportionality surplus in white-majority legislative districts. *Id.*

The Commission touts that of the 11 most probative 2022 election results, "Black-preferred candidates have a win percentage of 54.5%." Comm'n.Resp.Br.12,

[2] The Commission says this 20% number is "unsupported." Comm'n.Resp.Br.25, PageID.1663. But as the media reported after the 2022 election cycle, "the Capitol will lose two of five Black senators and two of 15 Black representatives." Ben Orner, *Black Michiganders voted heavily for Dems but were 'sacrificed' in representation*, Mlive (Nov. 28, 2022), https://www.mlive.com/politics/2022/11/black-michiganders-voted-heavily-for-dems-but-were-sacrificed-in-representation.html. That's 20%. *Accord* Malachi Barrett, *What a Democratic majority in Lansing could mean for Detroit*, Bridge (Dec. 20, 2022) https://www.bridgemi.com/michigan-government/what-democratic-majority-lansing-could-mean-detroit. The Caucus' website (https://michiganlbc.org/about/, visited June 19, 2023) lists 30 members, *contra* Comm'n.Resp.Br.26 n.10, PageID.1664, but not all members are Black.

PageID.1650. Think about that. In the "influence" districts with high BVAPs, where Black-preferred candidates are supposed to win *nearly all the time* with white crossover, those candidates win only half the races. That's a reason to grant summary judgment to Plaintiffs on *Gingles* preconditions two and three, not a reason against.

So the Commission shifts gears and attacks which elections are most probative of racial polarization. Comm'n.Resp.Br.13-16, PageID.1651-54. To be clear, Plaintiffs are not arguing the Court should "ignore" all elections involving an incumbent, or a Black-preferred candidate who is not Black, or general elections, etc. *Contra id.* But in determining whether there is racially polarized voting in the Detroit area, such elections are far less probative than non-incumbent elections between Black and white primary contestants. In the *most* probative elections—HD5, HD6, HD13, and SD8—white voters picked the white candidates over the Black candidates by an average of 93.35% to 6.63%. Pls'.SJResp.Br.36, PageID.1610. There is no need for a trial on "white-crossover voting" given these undisputed and one-sided percentages, even if the Commission pans them as "idiosyncratic."[3] Comm'n.Resp.Br.17, PageID.1655.

[3] The Commission disregards the incredibly polarized election in SD8 (BVAP 40.25%) where Incumbent Senator Marshall Bullock, a Black man from Wayne County, was defeated by Incumbent Senator Mallory McMorrow, a white woman from Oakland County, with McMorrow receiving 95.9% of the white vote. Comm'n.RespBr.16-17, PageID.1654-55; 2023.Handley.Report.App.C2, J.A.111. The Commission says this loss of Black opportunity is better attributed to the attention McMorrow received from a speech on transgender rights than on the low BVAP of this white-dominated district stretching from Detroit into the Oakland County suburbs of Ferndale, Berkley, Birmingham, Royal Oak, and Clawson. *Id.* McMorrow, who hails from the center of what Rep. Lemmons refers to as the "Oakland County Money Machine" no doubt raised more funds going into the democratic primary (i.e., $662,689.21) than

3. Admissibility and credibility

The Commission, through its expert, Dr. Palmer, suggests that Mr. Trende cherrypicked his data. Comm'n.Resp.Br.19, PageID.1657. His claims mostly involve Mr. Trende's purported failure to report results from the 2018 and 2020 Democratic primaries. Palmer.Report.11-19, J.A.128-135. But Mr. Trende's express goal was not to report on every primary election in 2018 and 2020, *because the Commission's own expert had already done so*, in a report cited by Mr. Trende and submitted into evidence. 2021.Handley.Report.9-12, J.A.33-36; Trende.Report.27-28, 40, J.A.334-35, 347. Mr. Trende's report uses these detailed results. *Id.* at 40-42, J.A.347-49. Mr. Trende testified about this at his deposition. Comm'n.Resp.Br.Ex.3; Trende Dep.150:6-10, PageID.1735.

Dr. Palmer also criticizes Mr. Trende for not producing results for the HD4 2018 Democratic primary. Palmer.Report.15, J.A.131. But as Mr. Trende explained, "[m]ost of the races here are difficult to interpret, because they often feature multiple candidates running." Trende.Report.36, J.A. 343. This is consistent with Dr. Handley's conclusion—which Mr. Trende already indicated he

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Senator Bullock, but she retained almost half of those funds (i.e., $311,369.23) for the general election. Ex.G. More telling is that McMorrow's 2021 Annual campaign finance statement shows that before the contest even began—long before her speech—she had significantly more cash on hand ($185,937.40) than Bullock raised the entire cycle. Ex.H. What's more, McMorrow's speech appears not to have garnered her much support from the Black community in the southern portion of SD8 where, of the 9,747 itemized direct contributions McMorrow received between January 1, 2022, and August 22, 2022, only 17 (0.174%) were from Detroit residents. Ex.I; https://cfrsearchnictusa.com/documents/527336/details/filing/contributions?schedule=1A&changes=0&page=1

accepts. 2021.Handley.Report.12, J.A.36. And Mr. Trende *did* report the 2018 HD2 Democratic primary as an instance where the differences between the white-preferred and Black-preferred candidates were so stark that he disagreed with Dr. Handley's analysis, Trende.Report.36, J.A. 343; and that it was too difficult to determine if the 2018 HD5 Democratic primary was polarized. Trende.Report.38, J.A. 345. Dr. Palmer's criticism has no merit based on the experts' similar findings.

The Commission further claims that the results of the 2018 HD4 Democratic primary contradict Mr. Trende's claim that there is no evidence under the previous House District maps suggesting that the Black-preferred candidate can prevail with less than 47% BVAP. Comm'n.Resp.Br.19-20, PageID.1657-58. But Mr. Trende did not point to the results of the 2018 HD4 primary as an example of racially polarized voting. The context of this portion of Mr. Trende's report discusses Dr. Handley's finding that the BVAP in HD4 was 47.27%, consistent with his own. *Id.* at 34-35, J.A. 341-42. As Mr. Trende explained at deposition, there are different methods of measuring BVAPs (*e.g.*, Black alone, 'any part' Black). Due to this, he and Dr. Handley likely generated different BVAP figures. Comm'n.Resp.Br.Ex.3; Trende Dep.156:19-24, PageID.1740.

The Commission also criticizes Mr. Trende for not reporting the results of the 2018 HD11 Democratic primary. Curiously, they then concede that Mr. Trende did, in fact, discuss this election, where Jewell Jones won a racially polarized primary. Comm'n.Resp.Br.20, PageID.1658. Mr. Trende explained that the 2018 HD11 Democratic primary was unique, as it featured a Black incumbent who had been

appointed by the party committee and won his seat in a special election. Trende.Report.36, J.A. 3430.

The Commission's next attack on Mr. Trende is that he failed to report the results of the 2022 SD11 primary, which was not polarized. But SD11 is a supermajority-white district with a BVAP of just 20% and thus obviously not a Black-opportunity district. Comm'n.Resp.Br.Ex.3; Trende Dep.159:21-25, PageID.1741.

Defendants separately attack Rep. Lemmons as an inadmissible "expert" witness whose opinions lack "any foundation or credibility." Comm'n.Resp.Br.21-22, PageID.1659-60. But Rep. Lemmons does not purport to give opinions, only facts. *See generally* Lemmons.Aff., J.A.521. And it is facially absurd to say that a former Black legislator with 50 years of experience campaigning in Detroit and its suburbs has no foundation or credibility to say what happened on the ground in recent elections in which he directly participated. *Id.* at ¶¶1-9, J.A.521-23; Lemmons.Affidavit.6.16.23., Ex.J.

4. The validity of "influence"/ "crossover" districts

The Commission criticizes Plaintiffs for insisting that "influence" districts (or "crossover" districts, to use the Commission's preferred term) have no basis in VRA jurisprudence. Comm'n.Resp.Br.24-25, PageID1662-63. But as the Commission's counsel, Baker Hostetler, conceded in recent North Carolina redistricting litigation, when the data "justifie[s] the use of race to draw districts to protect the state from Section 2 liability"—which is the Commission's contention here—"then the remedy is to require the state to adopt the majority-Black districts, and not crossover districts

that encompass only parts of the demonstrative districts. *Shaw* [*v. Hunt*], 517 U.S. [899,] 916 [(1996)]. States have the discretion to draw majority-Black districts when there is evidence of the three *Gingles* threshold conditions, but this does not give states the authority to replace majority-Black districts with crossover or influence districts. *Bartlett v. Strickland*, 556 U.S. 1, 23-24 (2009)." Legislative Defs.-Appellants'Br.60-61, *North Carolina League of Conservation Voters, Inc. v. Hall*, No.413PA21 (Sup Ct. of N. Carolina) (cleaned up). Per the Commission's counsel, "[t]here is simply no basis in law to argue that [a state] has an obligation to draw districts that Black-preferred candidates can win at levels of BVAP of less than 50%." *Id.* at 63.

### 3. Plaintiffs are entitled to summary judgment under the totality of the circumstances.

The Commission also concedes that it had "good reasons to believe a Section 2 claim could be made out under the totality of the circumstances" based on the report of their expert, Bruce Adelson. Comm'n.Br.29-30, PageID667-68. Their new arguments in opposition to summary judgment fail.

First, this Court does not yet need to determine the "performance" of "alternative" districts. *Contra* Comm'n.Resp.Br.26, PageID.1664. That's a question of remedy. Second, it is irrelevant whether "members of the minority group have been elected to public office;" the question is whether Black voters' ability to elect candidates of their choice have been diluted. *Contra id.* Third, as shown above and in Plaintiffs' previous briefs, it is not reasonable to say there is "strong white crossover voting" in Detroit and its suburbs in racially polarized elections, unless by "strong"

the Commission means single-digit percentages. *Contra id.* Finally, the *only* evidence of whether Black voters are being adequately represented in the Michigan Legislature is that they are not. Smith.Aff.¶¶42-51, J.A.517-19; Lemmons.Aff.¶¶17-20, 25-27-39-40, 42-48, J.A.525-27, 532-34; *contra* Comm'n.Resp.Br.26-27, PageID.1664-65. Plaintiffs are entitled to summary judgment on the totality of the circumstances.

### C. Summary judgment is proper as to Counts III and IV because the Commission created the Districts with race as the predominant consideration in violation of the Equal Protection Clause.

It is unrebutted that the Commission used racial quotas—a cap of 40% BVAP—to draw the so-called crossover districts in the Detroit area. Pls'.SJ.Resp.Br.33-34. "Under the Equal Protection Clause, districting maps that sort voters on the basis of race 'are by their very nature odious.'" *Wis. Legislature v. Wis. Elections Comm'n.*, 142 S. Ct. 1245, 1248 (2022) (quoting *Shaw v. Reno*, 509 U.S. 630, 643 (1993)). *Contra* Comm'n.Resp.Br.28-31, PageID.1666-69 (arguing that racial quotas are o.k. in some circumstances). The Commission claims this is a post-trial, district-by-district determination. *See id.* But when the entire redistricting process—and every district line—was driven by racial quotas, then a trial is unnecessary.

The Commission claims that its racially gerrymandered maps are the product of considering communities of interest and politics. As to communities of interest, Plaintiffs explained above in Section I.B.1 that the Commission could not even define communities of interest, and it persistently paired some of the poorest, predominantly Black urban municipalities in the State with some of the wealthiest, white-dominated suburban municipalities. Again, this is not a serious argument.

As for politics, it is impermissible for map drawers to single out Black communities *as Black communities* to achieve any political goal. *Contra* Comm'n.Resp.Br.32-33, PageID.1670-71. Yet that is exactly what the Commission's own reports show. That testimony is "direct evidence" of improper racial intent, *Cooper v. Harris*, 581 U.S. 285, 291 (2017), and Mr. Trende's Sequential Monte Carlo analysis confirms it, Pls'.SJ.Br.39-43, PageID.620-43. The fact that the Commission may have used partisan-fairness goals that Mr. Trende did not, *see* Comm'n.Resp.Br.31, PageID.1669, hardly justifies the odious practice of race-based map drawing.

The Commission's narrow-tailoring argument is difficult to comprehend. In essence, the Commission is saying that because the *Gingles* preconditions are satisfied and VRA compliance is a compelling interest, the most narrow way to satisfy the VRA is to provide *fewer* majority-minority districts where Black candidates of choice will be elected in racially-polarized elections. That can't be right. Again, the crutch of the argument is a purportedly "sufficient patterns of white crossover voting to ensure equal Black electoral opportunity." Comm'n.Resp.Br.34, PageID.1672. But when 9 out of 10 white voters reject the Black candidate of choice in the most probative elections, Pls'.SJ.Resp.Br.36, PageID.1610, there is no such opportunity.

The argument is also legally faulty. In *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006), the Supreme Court held that VRA § 2 does not justify a state's use of race to create crossover districts. *Id.* at 445. Assuming the opposite, as does the Commission, "would unnecessarily infuse race

into virtually every redistricting, raising serious constitutional questions." *Id.* at 445-46. Likewise, in *Bartlett v. Strickland*, 556 U.S. 1 (2009), the Court rejected the notion that an influence district is an "effective minority district." *Id.* at 14. Rather VRA § 2 only allows states to use race in redistricting if a geographically compact group of minority votes constitutes a majority of a district's voters. *Id.* at 14-18. That is because "claims in which success for a minority depends upon crossover majority voters would create serious tension with the third *Gingles* requirement that the majority votes as a bloc to defeat minority-preferred candidates." *Id.* at 16. Having conceded that it used race to draw redistricting maps because of the likelihood that Plaintiffs satisfy the three *Gingles* preconditions and the totality of the circumstances, the Commission is barred from arguing that influence or crossover districts are the appropriate (indeed, most narrowly tailored) way to solve the VRA problem.

## III. CONCLUSION

The Commission implicitly concedes that (valid) concerns over potential VRA liability forced it to use race when drawing the Linden and Hickory plans. But rather than maintain the many majority-minority districts that historically existed in Metro Detroit, the Commission used racial quotas—40% BVAP caps—to draw bacon-mandered districts that diluted Black voting power due to a lack of white crossover voting that surprised only the Commission and its experts. A trial is not necessary to conclude that poorly funded Black candidates from Detroit have little chance of competing with cash-rich, white candidates from Macomb and Oakland Counties. The

result is liability as a matter of law under both the VRA *and* the Equal Protection Clause.

Accordingly, Plaintiffs request summary judgment on all four Counts and expedited briefing on the appropriate remedy.

Respectfully submitted,

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Dated: June 20, 2023

**CERTIFICATE OF COMPLIANCE**

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 20, 2023, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

| | |
|---|---|
| DONALD AGEE, JR., an individual, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>JOCELYN BENSON, in her official capacity as the Secretary of State of Michigan, *et al.*;<br><br>Defendants. | Case No. 1:22-cv-00272<br><br>**Three-Judge Panel Appointed Pursuant to 28 U.S.C. § 2284(a)**<br><br>**ORAL ARGUMENT REQUESTED** |

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| B | MICRC_4871-72 |
| C | Dissenting Report by Commissioner Erin Wagner |
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# EXHIBIT A

2014 WL 316703
Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

Anne POPE; Wanda Willingham; Geraldine Bell; Samuel Coleman; and Lee Pinckney, Plaintiffs,
v.
COUNTY OF ALBANY; and Albany County Board of Elections, Defendants.

No. 1:11–cv–0736 (LEK/CFH).
|
Jan. 28, 2014.

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Peter G. Barber, Murphy, Burns Law Firm, Thomas Marcelle, Adam G. Giangreco, Albany, NY, for Defendants.

***MEMORANDUM–DECISION and ORDER***

LAWRENCE E. KAHN, District Judge.

## I. INTRODUCTION

***1** Before the Court are Plaintiffs Anne Pope, Wanda Willingham, Geraldine Bell, Samuel Coleman, and Lee Pinckney's ("Plaintiffs") Motion for partial summary judgment ("Plaintiffs' SJ Motion") and Defendants County of Albany ("County") and Albany County Board of Elections' (collectively, "Defendants") Motion for summary judgment ("Defendants' SJ Motion") in this action challenging the redistricting of the Albany County Legislature ("Legislature") under Section 2 of the Voting Rights Act of 1965 ("VRA"), 42 U.S.C.1973 ("Section 2"). Dkt. Nos. 209; 214. The Court also considers Plaintiffs' second Motion for leave to amend their Complaint and attached Memorandum of law, which Defendants have opposed. Dkt. Nos. 226 ("Motion to Amend"); 226–1 ("Motion to Amend Memorandum"). For the reasons that follow, the Court grants Plaintiffs' SJ Motion in part and denies it in part, and denies Defendants' SJ Motion.

## II. BACKGROUND

### A. Procedural Posture

Plaintiffs filed a Complaint in June 2011 alleging that the VRA requires the creation of an additional majority-minority district ("MMD") in the Legislature following population shifts reflected in the 2010 Census. Shortly thereafter, Plaintiffs filed a Motion for preliminary injunction to prevent the County from holding elections under the Legislature's operative redistricting plan. Dkt. No. 12 ("PI Motion"). They argued that: (1) it is possible to create 5 MMDs within the City of Albany ("City") using a narrow definition of black voters, Dkt. No. 30 ("PI Memorandum") at 12; (2) the "black community [has] routinely voted as a bloc" and, thus, "the black community is politically cohesive, as are blacks and Hispanics," *id.* at 13; and (3) that the minority-preferred candidate is usually defeated and the totality of the circumstances supports a finding of vote dilution, *id.* at 15–26. Defendants filed a response, Dkt. No. 40 ("PI Response"), arguing that Plaintiffs could not prove that minority voters were sufficiently numerous to create five majorityminority districts "when counting Blacks alone," Dkt. No. 40 ("PI Response") at

11–12, as well as that the Plaintiffs had not proved the rest of the *Gingles* factors. *Id.* at 13–23. The Court denied the PI Motion, holding that Plaintiffs failed to prove that they were likely to succeed on the merits. Dkt. No. 76.

Plaintiffs filed an interlocutory appeal ("Appeal"). Dkt. No. 78. The Second Circuit found error in the Court's requirement of something more than a simple majority at the first step of Section 2 analysis, but ultimately affirmed the Court's decision. Dkt Nos. 153, 153–1; *Pope v. Cnty. of Albany,* 687 F.3d 565 (2d Cir.2012). Meanwhile, Plaintiffs filed an Amended Complaint, Dkt. No. 100 ("Amended Complaint"), which is the operative pleading for purposes of this decision. [1]

Plaintiffs' Motion seeks judgment that the black population in Albany County is: (1) sufficiently numerous and geographically compact to justify five MMDs; and (2) politically cohesive. Dkt. No. 210 ("Plaintiffs' SJ Memorandum"). Defendants filed a Response, and Plaintiffs a Reply. Dkt Nos. 230 ("Defendants' SJ Response"); 241 ("Plaintiffs' SJ Reply"). [2]

***2** Defendants' Motion seeks judgment on Plaintiffs' claim to the extent it relies upon a coalition of black and Hispanic voters. In particular, Defendants argue that: (1) Plaintiffs lack standing to bring a claim under Section 2; (2) the VRA does not allow a black and Hispanic voting coalition; (3) Plaintiffs cannot show political cohesion; (4) Plaintiffs cannot show that racially polarized voting yields white bloc votes sufficient to usually defeat minority-preferred candidates. Dkt. No. 214–24 at 1–2 ("Defendants' SJ Memorandum"). Plaintiffs submitted a Response, and Defendants a Reply. *See* Dkt. Nos. 228 ("Plaintiffs' SJ Response"); 242 ("Defendants' SJ Reply").

Both parties submitted Statements of material facts with their Motions. Dkt. Nos. 211 ("Plaintiffs' SMF"); 214–1 ("Defendants' SMF"). Defendants responded to Plaintiffs' SMF and Plaintiffs replied. Dkt. Nos. 230–1 ("Defendants' SMF Response"), 241–1, ("Plaintiffs' SMF Reply"). Plaintiffs responded to Defendants' SMF, including a counter-statement of facts. Dkt. No. 229 ("Plaintiffs' SMF Response" and "Plaintiffs' Counter–SMF").

During summary judgment briefing, the parties stipulated that Plaintiff Janis Gonzalez ("Gonzalez"), the only Hispanic Plaintiff, would withdraw her claim. Dkt No. 222. Two weeks later, Plaintiffs filed their second Motion to Amend to add additional plaintiffs, some of whom are Hispanic, and who live both inside and outside the City the Albany. *See* Mot. Am. Mem. Defendants' Opposition challenges the Motion to Amend on several bases: (1) that the Motion to Amend would cause undue delay; (2) that Plaintiffs brought the Motion in bad faith; (3) that the Motion to Amend would prejudice Defendants; and (4) the Motion to Amend is futile. *See generally* Opp. Mot. Am.

**B. Facts**

County voters in single-member districts elect 39 representatives to sit on the Legislature every four years. Defs.' SMF ¶ 1. After each decennial United States Census ("Census"), the County redraws its districts to account for population shifts. Pls.' SMF ¶ 2.

After both the 1990 and 2000 Census, minority voters in the County—and, specifically, in the City—filed Section 2 claims against Defendants ("1990 Litigation" and "2003 Litigation"). Pls.' Counter–SMF ¶ 7. Each time, the County modified its redistricting plans. *Id.* The 1990 Litigation increased the number of MMDs from one to three. *Id.* ¶ 7; Dkt. No. 1–2 ("1991 Consent Decree"). The County maintained the three MMDs when it redrew districts subsequent to the 2000 Census. *See Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany,* 281 F.Supp.2d 436, 440 (N.D.N.Y.2003). Minority voters sued for and obtained an injunction. *Id.* at 457. The parties entered a consent decree, which created a fourth MMD. Pls.' Counter–SMF ¶ 7.

The Department of Justice ("DOJ") releases racial-demographic data. The relevant demographics are Hispanic population, non-Hispanic DOJ black population, [3] and non-Hispanic white population. [4] The County's total population as of the 2010 Census was 304,204, of which the voting-age population ("VAP") was 243,573. U.S. Census, 2010 Redistricting Data (Public Law 94–171) Summary File, Albany County, N.Y. [5] The Hispanic population was 14,917, with a VAP of 10,024, the DOJ black

population was 39,087, with a VAP of at least 26,196 but no more than 29,435, [6] and the white population was 231,152, with a VAP of 197,006. [7] *Id.*

***3** The Albany County Redistricting Commission ("Commission") is charged with examining new Census data and creating a map of proposed new districts. Pls.' SMF ¶ 2. The Commission held hearings to allow the public to comment before releasing proposed districts. Pls.' CounterSMF ¶ 8. However, Plaintiffs allege that members of the minority communities were generally not aware of these meetings because they were held in unfamiliar locations or were minimally advertised. *Id.* Minority voters that did attend the meetings advised the Commission that the minority population had grown since 2000, and that a fifth MMD was therefore warranted. *Id.* ¶ 9. Aaron Mair presented an alternative redistricting plan, the Arbor Hill Environmental Justice plan ("AHEJ Plan") to illustrate the possibility of creating five MMDs in the City. *Id.* ¶ 14. The Commission maintained the number of MMDs at four, *id.* ¶ 11, reasoning that there were "not enough numbers to justify" a fifth MMD, Dkt. No. 231–17 at 3. However, Mr. Merrill, who drew the districts for Defendants, relied on a definition of "minority" as "single race black." Dkt. No. 231–17, at 177:2–178:2. The Legislature passed the Commission's plan as Local Law C, which the County Executive signed into law. Pls.' Counter–SMF ¶¶ 18–19.

**C. Expert Findings on Racial Polarization**

Plaintiffs and Defendants employed experts to analyze racially polarized voting and other data relevant to Section 2 litigation. Plaintiffs' first expert, Dr. Baodong Liu, analyzed 46 elections between his original and supplemental reports to test for racial bloc voting and minority candidate success. *Id.* ¶ 24–25. Dr. Liu's supplemental Declaration and Report focused on 34 single-member elections where a black candidate ran against a white candidate, and 12 multi-member elections. [8] Dkt. No. 231–25 ("Liu Report") at 4–5. Dr. Liu analyzed only the voting patterns of black and white voters because of "the lack of sufficient statistical data on Hispanic voters," and defined black voters for the purposes of his analysis as "non-Hispanic Black." Pls.' Counter–SMF ¶ 27; Defs.' SMF ¶ 33. Dr. Liu concluded that racially polarized voting occurred in 19 single-member elections. Liu Report at 6. Of the 15 elections that were not polarized, ten involved incumbent candidates and 14 were "non-competitive." *Id* . at 7–9. In 11 of the 12 multi-member elections analyzed by Dr. Liu, white voters' most preferred candidate was white, and black voters' most preferred candidate was black. *Id.* at 5–6. Dr. Liu found that black voters, as defined above, were " 'politically cohesive' in that they have overwhelmingly preferred African American candidates as their choices in biracial or multiracial elections involving black and white candidates." *Id.* at 6–7.

Defendants also retained an expert, Dr. Ronald Gaddie, to analyze political cohesion and racial bloc voting. *See* Dkt. No. 122. However, to the Court's knowledge, Dr. Gaddie's expert report has never been entered into the record, and Defendants do not rely on it in their papers.

***4** Plaintiffs' second expert, William Cooper, analyzed demographic and socio-economic Census data for the County, as well as Local Law C and the AHEJ Plan. Dkt. No. 231–23 ("Cooper Supplemental Declararation") ¶ 6. Mr. Cooper concluded that "African–Americans and Latinos in Albany County lag behind whites across most socioeconomic measures." [9] *Id.* ¶ 9. Mr. Cooper further concluded that "there is little appreciable difference in the overall socio-economic status of African–Americans and Latinos." *Id.* ¶ 12. Mr. Cooper also analyzed potential districts using computer software, and found that the AHEJ plan "complies with one-person, one-vote requirements ... [and] other key traditional redistricting criteria such as compactness, contiguity, and the non-dilution of minority voting strength." Dkt. No. 54 ("Cooper Am. Declaration") ¶¶ 19–21, 27–28. Meanwhile, Mr. Cooper contends that Local Law C "packs minorities into four districts." *Id.* ¶ 29.

Mr. Cooper also created several additional "Illustrative Plans." The first Illustrative Plan merges the AHEJ MMD allocation with the existing framework of Local Law C, and would require the redrawing of ten out of 39 districts. *Id.* ¶ 31–33. Mr. Cooper compares this design with an "Illustrative Plan 2" that creates 6 MMDs. [10] *Id.* ¶ 36–37. Mr. Cooper has also created a third Illustrative Plan, which aims to make as few changes to district lines as possible to create 5 MMDs. *Id.* ¶ 38. While this approach

creates larger majorities of minority voters than the AHEJ Plan, each MMD contains below-average total population. *Id.* ¶ 38; Defs.' SMF ¶ 21.

## III. LEGAL STANDARD

### A. Summary Judgment

Summary judgment is proper where "there is no genuine issue as to any material fact," and thus "the movant is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Niagara Mohawk Power Corp. v. Hudson River–Black River Regulating Dist.,* 673 F.3d 84, 94 (2d Cir.2012). The moving party must first meet a burden of production, which differs depending on whether the moving party will have the burden of proving the claim or element at trial. *Celotex,* 477 U.S. at 330–32 (Brennan, J., dissenting). Because Plaintiffs will bear the burden of proving the *Gingles* factors at trial, they "must support [their] motion with credible evidence—using any of the materials specified in Rule 56(c)—that would entitle [them] to a directed verdict if not controverted at trial." *Id.* at 331. Defendants will not bear the burden at trial; they may, in support of their Motion: (1) "submit affirmative evidence that negates an essential element of the nonmoving party's claim"; or (2) "demonstrate to the Court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Id.* If a moving party has carried its burden, the nonmoving party must raise some genuine issue of material fact; "metaphysical doubt as to material facts" is not enough. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). However, the burden of persuasion remains at all times with the moving party, who must affirmatively demonstrate entitlement to judgment as a matter of law. *Celotex,* 477 U.S. at 332.

### B. VRA Section 2 Claims

***5** Courts assess the merit of Section 2 vote dilution claims under the three-step framework specified in *Thornburg v. Gingles.* A plaintiff must prove that: (1) the alleged minority group is sufficiently numerous and geographically compact to compose a majority of a single-member district; (2) members of the minority group are politically cohesive; and (3) that white bloc voting is usually sufficient to defeat the minority-preferred candidate. *See generally Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25. Although it would be "a *very* unusual case" where a plaintiff establishes the *Gingles* factors and fails to establish a Section 2 violation, courts must still consider the totality of the circumstances—additional indicia that tend to show a pattern and history of discrimination and a need for redress. *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.,* 4 F.3d 1103, 1135 (3d Cir.1993) (emphasis in original).

## IV. DISCUSSION

### A. Defendants' Motion for Summary Judgment

Defendants advance several arguments. Defendants first contend that Plaintiffs reside within existing MMDs under the current scheme and therefore do not have standing to bring this action. Defs.' Mem. at 11. Second, Defendants contend that black and Hispanic voters may not form a coalition for the purposes of Section 2. *Id.* at 13. Third, Defendants contend that Plaintiffs have not proved political cohesion among the black and Hispanic voting populations taken as a whole. *Id.* at 26. Fourth, Defendants contend that Plaintiffs cannot prove that white bloc voting is usually sufficient to defeat the minority-preferred candidate. *Id.* at 28. The Court rejects each of these arguments, and thus denies summary judgment.

#### *1. Standing* [11]

Defendants posit that Plaintiffs, as residents of existing majority-minority districts, lack standing to bring a claim for vote dilution. *Id.* at 11. Defendants argue that only residents of majority-white districts suffer injury as a result of Local Law C, and thus only those residents are properly situated to bring a claim. *Id.*

In general, a plaintiff has standing if she satisfies three elements: (1) she has suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) she can show a connection between the defendant's conduct and the complained injury; and (3) that a favorable decision is likely to redress the injury. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). In a Section 2 claim, the putative injury is that the minority lacks "substantial proportionality" of political opportunity—per capita voting power on par with the majority [12] —under the existing voting system. See *Johnson v. DeGrandy,* 512 U.S. 997, 1013–15, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). The first *Gingles* factor provides further guidance on whether a Plaintiff has standing to assert a Section 2 claim. That threshold analysis "requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Id.* at 1008. Thus, supported allegations that Plaintiffs reside in a reasonably compact area that could support additional MMDs sufficiently proves standing for a Section 2 claim for vote dilution. [13] Here, Plaintiffs have identified a personalized injury: that the apportionment of 4 MMDs to the sufficiently numerous and geographically compact minority population, as opposed to the 5 MMDs that Plaintiffs contend are required by the VRA, dilutes Plaintiffs' individual voting power-including those in existing MMDs. Therefore, all Plaintiffs have standing to litigate these claims.

***6** Defendants rely on *United States v. Hays,* 515 U.S. 737, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) to support their assertion that only those residents of majority-white districts may properly sue for relief under the VRA. *Hays* was not a Section 2 case, but a challenge to a redistricting plan on Equal Protection grounds. *Id.* at 738–39. The voters lacked standing not because they resided in an MMD (they did not), *see Hays,* 515 U.S. at 742, but because they did not challenge the constitutionality of their own district or area. *Id* . at 746–47; *id.* at 750 (Breyer, J., concurring) (emphasizing that Plaintiffs are "voters ... who do not reside within the district they challenge"). [14] Plaintiffs here, in addition to making their claim under Section 2 as opposed to the Fourteenth Amendment, challenge the drawing of district lines in a compact area within the City of Albany, where they reside. *See* Pls.' SJ Mem. at 8. The Parties' discussion of "packing" and "fragmentation" claims, Pls.' SJ Resp. at 12–13; Defs.' SJ Reply at 3–4, obscures the actual issue in the standing inquiry—whether or not black and Hispanic voters allege that they do not enjoy proportional political opportunity. *See DeGrandy,* 512 U.S. at 1015–16.

*2. Minority Coalitions*

Defendants argue that black and Hispanic populations together do not comprise a "minority group" under Section 2, entitling Defendants to summary judgment on Plaintiffs' combination of black and Hispanic populations. Defs.' SJ Mem. at 14. [15]

Courts are divided on whether Section 2 authorizes a coalition of minority voters to comprise a "minority group." The Second Circuit declined to decide this issue on appeal. *Pope v. Cnty. of Albany,* 687 F.3d 565, 573 n. 5 (2d Cir.2012). However, it previously upheld a Section 2 violation where the plaintiffs were a mixed group of black and Hispanic voters. *See Bridgeport Coal. of Fair Representation v. City of Bridgeport,* 26 F.3d 271, 275–76 (2d. Cir.1994), *vacated on other grounds,* 512 U.S. 1283, 115 S.Ct. 35, 129 L.Ed.2d 931 (1994). The Supreme Court has likewise reserved judgment, stating only that *if* such claims were allowed, the entire minority group would have to be politically cohesive. *Growe v. Emison,* 507 U.S. 25, 41, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993). The treatment of aggregate coalition claims has varied among other circuits. *Compare Campos v. City of Baytown,* 840 F.2d 1240 (5th Cir.1988) (approving aggregated claims), *and Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs,* 906 F.2d 524, 526 (11th Cir.1990) (same), with *Nixon v. Kent Cnty. .,* 76 F.3d 1381 (6th Cir.1996) (denying coalition claims based upon the text of the VRA).

The Court finds that the plain text of the statute, its purpose, and the legislative history do not abridge the right of politically cohesive minority groups to aggregate. Defendants advance the line of reasoning in *Nixon.* Defs.' SJ Mem. at 15–16. The Sixth Circuit held that, because Section 2 refers to potential claimants as "members" of a singular "class of citizens protected by subsection (a)," Congress intended to allow only a single racial group to claim under the VRA. However, the language of subsection (a) does not cabin potential claimants into one racial group; it affords protection from "denial or abridgement of the right of *any citizen* of the United States to vote on account of race or color." 42 U.S.C.1973 (emphasis added). This broad

wording does not suggest that only a single group may allege a violation of its voting rights. *See Chisom v. Roemer,* 501 U.S. 380, 403, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991). [16]

*3. Political Cohesion*

***7** Defendants next assert that, even if a joint claim is permitted, Plaintiffs cannot prove political cohesion between black and Hispanic voters. Defs.' SJ Reply at 16. Defendants point out that there is no development in the record of any empirical data suggesting cohesion, and posit that the whole of Plaintiffs' anecdotal evidence cannot support a finding of political cohesion. *Id.* at 17–18. Plaintiffs present empirical evidence—which Defendants do not challenge in their Memorandum or Reply—showing cohesion among non-Hispanic black voters, but not between black and Hispanic voters. *See* Liu Report at 4–7. Thus, the Court must determine whether anecdotal evidence alone can support the conclusion that Hispanic voters are politically cohesive with black voters, and if so, whether the anecdotal evidence present here is sufficient to raise a genuine issue of material fact.

Anecdotal evidence can support a finding of political cohesion. The Second Circuit quoted the Supreme Court's language in *Gingles,* which discussed racially polarized voting, as applicable to the evaluation of cohesion. *See Pope v. County of Albany,* 687 F.3d 565, 573, n. 5 ("Courts must rely on other factors to determine whether the Section 2 claim has been proved."). The Fifth Circuit adopted a similar approach, stating that "[s]tatistical evidence is not a *sine qua non* to establish cohesion." *Brewer v. Ham,* 876 F.2d 448, 454 (5th Cir.1989). Thus, the Court rejects Defendants' contention that a failure to show cohesion between black and Hispanic voters through statistical evidence is fatal to a Section 2 claim.

Both parties cite *Bridgeport* to support their arguments, the facts of which are similar to the ones present here. The *Bridgeport* plaintiffs, a group of blacks and Hispanics, produced ample evidence that black voters in the city exhibited polarized voting, but showed less cohesion among Hispanic voters except in cases where the candidate was Hispanic. *Bridgeport,* 26 F.3d at 276. Plaintiffs introduced additional "anecdotal evidence directly bearing on the political cohesiveness issue." *Id.* The defendants "introduced little or no evidence on the issue of cohesiveness," *id.,* and the Second Circuit found sufficient cohesion to uphold a grant of preliminary injunction. [17]

The facts before the Court largely mirror those in *Bridgeport.* Plaintiffs adduce significant empirical evidence showing political cohesion among the black community. Their expert, Dr. Liu, found that there is not sufficient data available to form a conclusion about Hispanic cohesion. Pls.' Counter–SMF ¶ 7. However, Plaintiffs have bolstered the available statistical evidence with socioeconomic analysis, *see* Cooper Report, evidence of joint political ventures, Pls.' Counter–SMF ¶¶ 40–68, and witness testimony, [18] much as the *Bridgeport* plaintiffs did. Meanwhile, Defendants have neither effectively attacked the veracity of Plaintiffs' evidence or conclusions, nor opted to introduce their own evidence.

***8** The parties agree that it is not possible to accurately analyze Hispanic voting patterns. Scholarship in the field has noted that ecological regression, ecological inference, and homogeneous precincts analysis are often "blunt" tools, and that, "[a]t some point, a racial or ethnic group's numbers in a jurisdiction are so low as to make separate estimation of the group's voting patterns both difficult and unlikely to be useful." D. James Greiner, *Ecological Inference in Voting Rights Act Disputes: Where Are We Now, and Where Do We Want to Be?,* 47 JLTRIMETRICS J. 115, 118, 125 (2007); *see also* David A. Freedman et al., *Ecological Regression and Voting Rights,* 15 EVALUATION REV. 673 (1991); Stephen P. Klein et al., *Ecological Regressions Versus the Secret Ballot,* 31 JLTRIMETRICS J. 393 (1991); W.S. Robinson, *Ecological Correlations and the Behavior of Individuals,* 15 AM. SOC. REV. 351 (1950). The Hispanic VAP in the County, while growing quickly, still comprises only a small percentage of voters. It is therefore unsurprising that the proof Defendants seek is unavailable.

Plaintiffs have compiled a record of anecdotal political cohesion to show that the black and Hispanic communities satisfy Section 2's cohesion requirements. The City "recently found the Black and Hispanic populations in the City to be politically cohesive for purposes of redistricting the City's Common Council wards." Pls.' SMF Resp. ¶ 47. "Get-out-the-vote" organizations such as One Hundred Black Men and People of Color Who Vote, as well as the local NAACP chapter, reach out to members of both races and have memberships that include blacks and Hispanics. *Id.* ¶¶ 55–57. Several successful minority-candidate campaigns

have relied on outreach to and support from the black and Hispanic communities. *Id.* ¶¶ 48–54. Plaintiffs have sufficiently raised issues of material fact that, when coupled with the empirical evidence of black voter cohesion, could support a finding of political cohesion. Thus, summary judgment is not appropriate.

*4. White Majority Bloc Voting*

The third *Gingles* prerequisite requires that voting be polarized along racial lines, and that majority bloc voting "usually" suffice to defeat the minority-preferred candidate. 478 U.S. at 51, 55–57. "[T]here is no simple doctrinal test for the existence of legally significant racial bloc voting"; "the degree of racial bloc voting that is cognizable ... will vary according to a variety of factual circumstances." *Id.* at 57. In cases where minority-preferred candidates achieve some success, "special circumstances, such as the absence of an opponent [or] incumbency ... may explain minority electoral success in a polarized contest." *Id.* (noting that the example circumstances are "illustrative, not exclusive"). In cases where some majority-minority districts already exist, the third *Gingles* factor can be proved where the majority tends to vote as a bloc "to bar minority groups from electing their chosen candidates except in a district where a given minority makes up a voting majority." *DeGrandy,* 512 U.S. at 1003–04. In a largely fact-driven inquiry, it is unsurprising that different circuits have developed divergent acceptable thresholds of minority success. *Compare Old Person v. Cooney,* 230 F.3d 1113, 1122 (9th Cir.2000) (recognizing that "usually" could mean "more than half of the time") *with Lewis v. Alamance Cnty.,* 99 F.3d 600, 606 (4th Cir.1996) ( "Suffice it to say that ['usually,' 'normally,' and 'generally'] mean something more than just 51%"). The Second Circuit has provided little additional guidance beyond stating that the third *Gingles* factor "recognizes the need for some flexibility." Pope, 687 F.3d at 578.

***9** Defendants' first argument, that Plaintiffs have not properly identified minority-preferred candidates, is largely duplicative of their political-cohesion arguments addressed above. Defs.' Reply at 21–22. However, Defendants also suggest in passing that Plaintiffs should have analyzed the group of black and Hispanic voters *together* for the racially polarized voting determination, rather than assuming that including the Hispanic population would not change the comparison of the black and white populations. See Defs.' Mem. at 28 ("[P]laintiff made no attempt to demonstrate the 'preferred' candidate of the coalition group."). Although the Court agrees that such a comparison would be preferable, Defendants have failed to argue either that using a combined test group of black and Hispanic voters is possible with the existing data, or that such combination would not demonstrate polarization. Because the Court must make all factual inferences in favor of the nonmoving party, *Celotex,* 477 U.S. at 330 n. 2 (Brennan, J., dissenting), Defendants have not shown that they are entitled to summary judgment on this basis. [19]

Defendants do not advance affirmative evidence to show that voting preferences are not polarized (although they do allege, as discussed, that Plaintiffs have not properly proved such polarization), or dispute that the minority-preferred candidate is successful less than 50% of the time. *See* Defs.' SJ Mem. at 29 ("Dr. Liu's report concedes that the 'preferred' candidate of the black community prevailed in 16 contests or 47% of the time."). Rather, they argue that the minority-preferred candidate is not successful enough to be "usually" defeated. Because there is widespread recognition that the third prong is a fact-based inquiry, *see, e.g., Gingles,* 478 U.S. at 57 (stressing the need to examine "factual circumstances"); Ruiz, 160 F.3d at 550 ("[A] '[W]hite majority' voting bloc must be read in the context of the facts presented to the court ...."); *Uno v. City of Holyoke,* 72 F.3d 973, 989 (1st Cir.1995) ( "[D]etermining whether racial bloc voting exists is not merely an arithmetic exercise .... To the contrary, the district court should ... make a practical, commonsense assay of all the evidence."), Defendants face a high bar in proving that they are entitled to judgment as a matter of law.

Defendants attempt to prove that minority success is sufficient to warrant judgment as a matter of law by citing standards used by courts in other jurisdictions. Defs.' Mem. at 29. In one of these cases, *Uno,* the First Circuit found error in the district court's findings because there was insufficient evidence of both minority and white bloc voting. 72 F.3d at 988. Specifically, Hispanic voters backed a candidate as a bloc in only four out of 11 elections. *Id.* Even under these circumstances, the thin record of racially polarized voting did not *per se* defeat the plaintiffs' claim; rather, the failure to assign proper weight to this evidence was the fatal flaw. *Id.* at 988–89. Defendants also cite a case in which the Third Circuit found clear error in the district court's holding that plurality-win schemes undermined that white-bloc voting consistently defeating minority candidates, *Jenkins,* 4 F.3d at 1122, and another in which the Sixth Circuit found that a 47% success rate of black candidates supported by black voters

was not itself sufficient to find sufficient white bloc voting in an at-large scheme, *Clarke v. City of Cincinnati,* 40 F.3d 807, 812–13 (6th Cir.1994).

***10** Even if the Court were to adopt these persuasive authorities, none provides a coherent standard to judge that the combination of minority success rate, additional anecdotal evidence, and the existence of special circumstances in the instant case could not reasonably support a finding that there is sufficient white bloc voting to "usually" defeat the minority-preferred candidate. Plaintiffs have showed that minority-preferred candidates are successfully less than half of the time. See Liu Supp. Report at 4. Even among successful minority candidates, several were incumbents, others won races within MMDs, and still others won immediately after prior successful litigation "might have worked a one time advantage for black candidates, Gingles, 478 U.S. at 76. See Pls.' Resp. at 28–32.

Defendants urge that, because the non-Hispanic DOJ Black VAP in the County is only 11%, minority success rates in excess of that amount are enough to show that no additional majorityminority districts are needed. See Defs.' Mem. at 30. Defendants mistakenly rely on *Barnett v. City of Chicago,* 141 F.3d 699, 705 (7th Cir.1998), for support. However, the "electoral power ... equal to its fraction of the electorate" to which Barnett refers is the number of MMDs, not the relative success of minority candidates. See *id.* at 705–06. Therefore, the Court finds that there are genuine issues of material fact as to whether or not minority-preferred candidates have usually been defeated due to white bloc voting, and summary judgment is not appropriate.

For all of the reasons detailed above, Defendants' Motion for summary judgment is denied.

**B. Plaintiffs' Motion for Partial Summary Judgment**

Plaintiffs seek summary judgment on the first two *Gingles* preconditions under a black-only theory. Plaintiffs contend that there is no genuine issue of material fact as to whether the black population is sufficiently numerous and geographically compact to form a majority of five MMDs, Pls.' Mem. at 8–15, and as to whether the black population is politically cohesive, *id.* at 15–16. Defendants dispute whether Plaintiffs have brought a black-only claim, Defs.' Resp. 4–5. Defendants contend that Plaintiffs' theory fails on the merits because: (1) Plaintiffs are required to show, and have not showed, that the minority group contains 50% of the Citizen Voting Age Population ("CVAP"), Defs.' SJ Resp. at 4–7, (2) the minority group is not geographically compact, *id.* at 7–9; and (3) there are disputed issues of material fact as to black voters' political cohesiveness. The Court finds that there is no genuine issue of material fact as to the first *Gingles* element of a black only claim, but that Plaintiffs have not proved political cohesiveness.

*1. Status of the Putative Black–Only Claim*

In general, a party may not raise a claim or defense for the first time in summary judgment briefing; rather the party's pleadings must put the opposing party on notice of the claims. *See George v. Reisdorf Bros., Inc.,* 410 Fed. Appx. 382, 384 n. 2 (2d Cir.2011); *Johnson v. Cleveland City Sch. Dist.,* 443 Fed. Appx. 974, 980 (6th Cir.2011) (discussing whether Plaintiff's claim was "fairly raised" in the Complaint); *Nunley v. Dept. of Justice,* 425 F.3d 1132, 1140 (8th Cir.2005) ("[T]he appropriate disposition of these claims ... will depend on whether they can be said to have been fairly raised in the original complaint."). In some circumstances, the parties' conduct in litigation allows a court to consider a claim that is not raised in the pleadings. *See* FED. R. CIV. P 15(b)(2) (allowing issues "not raised by the pleadings" to be "treated in all respects as if raised in the pleadings" when "tried by express or implied consent"); *Jund v. Town of Hempstead,* 941 F.2d 1271, 1287 (2d Cir.1991) (considering claims not raised in the complaint but briefed and argued without objection at summary judgment). However, defendants should be protected from reasonably conducting discovery on one theory of liability, and then having to defend against a different theory. *See Beckman v. U.S. Postal Serv.,* 79 F.Supp.2d 394, 407 (S.D.N.Y.2000) ("[A]t the very least, [a] plaintiff must set forth facts that will allow each party to tailor its discovery to prepare an appropriate defense").

***11** Defendants argue that Plaintiffs failed to raise a claim that the County's redistricting scheme dilutes the voting power of black voters alone. Defs.' SJ Resp. at 4–5. [20] Defendants point to Plaintiffs' "Cause of Action" section, where Plaintiffs allege:

83. The black and Hispanic populations in the County of Albany are sufficiently large and geographically compact to constitute a majority in five legislative districts.

84. The black and Hispanic populations in the City are politically cohesive.

Am. Compl. ¶¶ 83–84. Throughout the remainder of the "Cause of Action" section, Plaintiffs refer to the class of claimants as "minorities" and "the minority population." *Id.* ¶¶ 80–88.

The language in the complaint does not foreclose a black-only theory. The Amended Complaint states increases in "the non-Hispanic black population," of the County and City. *Id.* at ¶¶ 25, 30. While this data is useful in proving the first *Gingles* prong of Section 2 analysis under a black-only theory, it is hardly useful under a coalition claim except, perhaps, as one factor among many under a "totality of the circumstances" analysis. The Amended Complaint also states that both the black community and the Hispanic community are politically cohesive, which goes to the second element of the *Gingles* analysis for both a coalition and a black-only claim.

The parties' post-Complaint conduct indicates that there was a sufficient basis for Defendants to anticipate and conduct discovery on a black-only theory. Plaintiffs filed their original complaint on June 29, 2011. *Id.* Plaintiffs filed their Motion for preliminary injunction and a supporting brief on July 15, 2011. *See* PI Mot.; PI Mem. Discovery had not yet begun at the time of the initial briefing on preliminary injunction, and thus that briefing was relevant to parties' understanding of the nature of the case when crafting discovery.

Plaintiffs' Motion for preliminary injunction implicitly advances a black-only claim by arguing that black voters alone meet the three *Gingles* factors. Plaintiffs noted that "the increased population of blacks *alone* supports 5 MMDs with *non-Hispanic black VAPs* of between 50.44% and 52.67%" in satisfaction of the numerosity requirement of the first prerequisite. PI Mem. 12 (emphasis added). In support of the black community's political cohesion, Plaintiffs stated that "the black community has routinely voted as a bloc," with black candidates receiving "73.92% and 77.7% of the black votes" in City-wide elections and "94.95% and 82.44% of their votes" in County Legislature primaries. *Id.* at 14. Furthermore, all of the analysis on racial bloc voting and racial polarization compares black votes with white votes, and black-preferred candidates with whitepreferred candidates. *Id.* at 15–16.

In response, Defendants did not argue that these statistics were irrelevant. Rather Defendants argued only that the statistics were insufficient to show that Plaintiffs were likely to succeed on the merits. *See generally* PI Resp. Defendants justified their plan with respect to a black-only claim, stating that "[t]he County has created four reasonably compact MMDs with a sufficiently large black voting age population which allows black voters have [sic] to be able to elect candidates of their choice." *Id.* at 10. Defendants further argued that "Plaintiffs' plan (when counting Blacks alone) does not create an effective majority-minority district." *Id.* at 11–12. Defendants thereby acknowledge that Plaintiffs were proceeding on a black-only claim.

***12** The Court finds that, given the previous conduct of the parties and the broad language used in the Amended Complaint, Plaintiffs have fairly raised a black-only theory of vote dilution and thus may seek summary judgment on relevant issues.

*2. Merits of the Claim*

*a. Sufficient Numerosity and Geographic Compactness*

Plaintiffs move for summary judgment on the first *Gingles* element, that black voters in the County are sufficiently numerous and geographically compact to form five MMDs. In support of their motion, Plaintiffs refer to the AHEJ Plan, in which non-Hispanic DOJ black voters comprise a majority of the voting age population in five districts. Pls.' SJ Mem. at 5, 9–11. Defendants assert that (1) the AHEJ plan does not show that black voters comprise a voting majority of the *citizen* voting age population ("CVAP"); and (2) Plaintiffs' proposed districts are irregular and, thus, do not conform with constitutional standards for redistricting. See Defs.' SJ Resp. at 4–9. The Court finds that Plaintiffs have satisfied their burden of persuasion. Thus, summary judgment for Plaintiffs is appropriate on this issue.

In order to satisfy the first element of the *Gingles* analysis, Plaintiffs must prove that the class of minority voters forms, at least, a simple majority of a compact geographic area, allowing the minority group to form a simple majority of a proposed number of MMDs. Pope, 687 F.3d at 573; *Bartlett v. Strickland,* 556 U.S. 1, 18–19, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009); *League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 433, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006). [21]

Plaintiffs have set forth sufficient evidence. Plaintiffs have showed a majority in a compact area by providing several illustrative plans, each creating five districts in which non-Hispanic black residents comprise majorities. Cooper Am. Decl. ¶¶ 19–38. Furthermore, they have adduced evidence that the black population as a whole is geographically compact. Plaintiffs note that "more than 70 percent of the County's non-Hispanic black citizens live in a geographically compact area within the City of Albany." Pls.' SJ Mem. at 13. They narrow the concentrations of the black population further, describing certain neighborhoods with high concentrations of black residents. *Id.* at 13–14. Defendants have not disputed these basic facts in their summary judgment papers or elsewhere in the record. Instead, Defendants argue that Plaintiffs have not met their burden as to numerosity because they have not showed that black residents comprise a majority of the CVAP. Defs.' SJ Resp. at 5–7.

Defendants cite several cases that favor the use of CVAP over VAP for the first *Gingles* element. However, CVAP has been applied only where there is a significant noncitizen population. *See Barnett v. City of Chicago,* 141 F.3d 699, 705 (7th Cir.1998) (stating that VAP should apply where "noncitizens [are] not a significant part of the relevant population"); *Negron v. City of Miami Beach,* 113 F.3d 1563, 1568 (1 1th Cir.1997) ("Of course, [a previous Section 2 decision] did not address [CVAP], because there was no indication in that case that there was any disparity between black and white citizenship rates. Nor is there likely to be any disparity in citizenship rates, except in a case, such as this one, where the minority population includes a substantial number of immigrants."); *Rodriguez v. Pataki,* 308 F.Supp.2d 346, 369 (S.D.N.Y.2004) (noting that the use of CVAP instead of *total population* changed disputed districts from overpopulated to significantly underpopulated); *France v. Pataki,* 71 F.Supp.2d 317, 326 (S.D.N.Y.1999) (finding that the challenged areas "contain[ ] a high-proportion of immigrants who are non-citizens who are ineligible to vote under the Voting Rights Act"); *United States v. Village of Port Chester,* 704 F.Supp.2d 411, 419–20 (S.D.N.Y.2010) (requiring CVAP statistics for a community that was more than onethird noncitizen).

***13** There is no reason to require use of CVAP where there is no evidence of a significant noncitizen population. Given that CVAP data is less reliable VAP, [22] Defendants must first raise some evidence of a higher-than-normal non-citizen population among the minority group. Defendants make no such allegation here. Defendants argue only that "Plaintiffs have not shown that [the black citizenship rate] is 100 percent." Defs.' SJ Resp. at 7. [23] Because Defendants have not raised a genuine issue of material fact that would require the use of CVAP, Plaintiffs are entitled to summary judgment on the first *Gingles* factor. [24]

*b. Political Cohesion*

Plaintiffs also seek summary judgment on the second *Gingles* factor: political cohesion. In order to carry their burden, Plaintiffs must show that " 'a significant number' of minority voters 'usually' vote for the same candidate." *Mallory v. Ohio,* 173 F.3d 377, 383 (6th Cir.1999) (citing *Gingles,* 478 U .S. at 56). Plaintiffs argue that, based upon previous proceedings in this litigation and the consent degrees in the 1990 and 2000 litigation, Defendants are estopped from arguing that the black community is not politically cohesive. Pls.' SJ Reply at 10 n. 6. In the alternative, Plaintiffs argue that the findings of their experts and the development of substantial anecdotal evidence in the record leave no genuine issue of material fact as to cohesion. Pls.' SJ Mem. at 15–16; Pls.' SJ Reply at 10–13.

Defendants counter with largely irrelevant arguments. Defendants argue that, because black voters support candidates of several different parties, they are not truly cohesive. Defs.' SJ Resp. at 12. But that black cohesion is not simply due to party affiliation supports Plaintiffs' ultimate claim more than it detracts. Although there is disagreement as to whether political cohesion must be caused by race, as opposed to merely correlated with factors such as party affiliation, *see Gingles,* 478 U.S. at 82–83 (White, J., concurring); *id.* at 100–102 (O'Connor, J., concurring) (stating that electoral outcomes may sometimes be an insufficient measure of cohesion, as other factors could be at play), *independence* from interest-group politics does not undermine racial

cohesion. Indeed, ruling out party affiliation as a reason for polarized voting habits would bolster an inference that another factor, such as race, caused those disparities. Defendants have raised no other disputed issues of material fact.

Nevertheless, Plaintiffs are not entitled to summary judgment. Plaintiffs argue that judicial estoppel bars Defendants from contesting black cohesion because Defendants' positions in their preliminary injunction papers and the 1991 consent decree are inconsistent with that argument. Pls.' SJ Reply at 10 n. 6. However, Defendants did not concede cohesion in their opposition to preliminary injunction for the purposes of the entire litigation; rather, the Defendants did not dispute the likelihood of success on the merits on those grounds. PI Resp. at 19 ("The Second factor requires that Plaintiffs show that Blacks are politically cohesive. Defendants concede this point *for the purposes of this hearing.*"). Additionally, while the County's admission in joining the 1991 consent decree might prevent Defendants from arguing that the black community was not cohesive *in 1991,* it does not prevent them from arguing that the community is not cohesive now. Thus, the Court rejects Plaintiffs' argument that Defendants cannot contest whether the black community is presently cohesive.

***14** Plaintiffs are seeking summary judgment on cohesion using non-Hispanic DOJ Black data while they maintain that the proper definition of black is "any part black." [25] To grant Plaintiffs summary judgment on the issue of political cohesion among the black community using a nonHispanic DOJ Black definition, only to have them press an "any part black" definition at trial, would allow Plaintiffs to improperly "argue one *Gingles* factor by reference to a particular minority group, only to recast the minority group in arguing another factor." Pope, 687 F.3d at 577 n. 11. Although this inconsistency was not problematic for the first *Gingles* factor, [26] a more heterogeneous definition of the minority group is less likely to be cohesive. While Plaintiffs have also offered anecdotal evidence to support their claim, this fact-intensive consideration not appropriate for decision on summary judgment. *See, e.g., Calamia v. City of New York,* 879 F.2d 1025, 1035 (2d Cir.1989); *E.C. ex rel R.C. v. Cnty. of Suffolk,* 514 Fed. Appx. 28, 30 (2d Cir.2013). The Court holds that, based upon the facts in the record, a reasonable factfinder making all inferences in Defendants' favor could find that the class of any part black voters is not politically cohesive. Thus, summary judgment on this issue is inappropriate.

## V. MOTION TO AMEND THE COMPLAINT

Although the Court has discretion to grant or deny a motion to amend pleadings, *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), courts "should freely give leave [to amend] when justice so requires." FED R. CIV. P. 15(a)(2). Federal Rule of Civil Procedure 21 further allows the Court to "at any time, on just terms, add or drop a party." Amendment should be denied in cases of "undue delay, bad faith, and prejudice to the opposing party." *Barrows v. Forest Laboratories,* 742 F.2d 54, 58 (2d Cir.1984).

Plaintiffs argue that justice requires the addition of a Hispanic Plaintiff to replace Gonzalez, who prior to her withdrawal was the only Hispanic party to this case. Mot. Am. Mem. at 1–2. They assert that they moved "as quickly as possible" to notify Defendants that Gonzalez "needed to withdraw" and to amend the complaint—indeed, the Motion to Amend was filed two weeks after Gonzalez withdrew from the action. Mot. Am. Mem. at 1; *see generally* Dkt.

Defendants claim that allowing leave to amend would cause undue delay and prejudice. [27] Opp. Mot. Am. at 3–8. Defendants state that the Motion comes more than a year after the Court's deadline to amend pleadings, would necessitate the re-opening of discovery, and changes the nature of the litigation by expanding the geographic area at issue. Mot. Am. Opp. at 4–6. Although a court may deny amendments after pleading-amendment deadlines have passed, noncompliance with these deadlines does not, *per se,* prevent the amendments. *See, e.g., Soler v. G & U, Inc.,* 103 F.R.D. 69, 74 (S.D.N.Y.1984). In this instance, the potential viability of a black-Hispanic coalition claim weighs in favor of allowing the addition of a Hispanic Plaintiff. [28] Defendants have not argued that Gonzalez's departure from the action was anticipated by Plaintiffs before they moved to amend.

***15** The Court is loathe, however, to dramatically change the nature of the litigation after discovery has been conducted and summary judgment motions have been filed. *See Luellen v. Hodge,* No. 11–cv–6144P, 2013 WL 5490166, at *7–9 (W.D.N.Y.Sept.30, 2013). Plaintiffs' proposed Second Amended Complaint (Dkt. No. 226–4) includes five new Plaintiffs.

One of the proposed Plaintiffs, Nathan Lebron, lives within the Town of Colonie, located northwest of the City, and another, Joseph Gomez, lives in the town of Cohoes, which sits on the County's northern border. Given that Plaintiffs' prior claims have concentrated specifically on "the eastern portion of the City," Pls.' SJ Mem. at 8, the addition of these new parties would necessitate reevaluation of even the most basic elements of a Section 2 claim, including geographic compactness. Dramatically changing the scope and nature of the litigation after the close of discovery would cause undue delay and prejudice Defendants. Therefore, the Court denies the addition of Joseph Gomez and Nathan Lebron to the action.

Plaintiffs also propose the addition of three potential plaintiffs within the City of Albany. One of these three proposed plaintiffs, Vicente Alfonso, is Hispanic. Mot. Am. Mem. at 2 n. 1. He has already been deposed by Defendants. *Id.* at 3. The other two proposed plaintiffs, Stephanie Davis and Elaine Frazier, are black residents of the City. *See* Prop. Am. Compl.

The parties have familiarized themselves with the key issues of this litigation. The addition of these new plaintiffs would require little additional discovery, as one proposed plaintiff has already been deposed, and few new relevant issues are raised by the addition of individual similarly situated plaintiffs. Where the burden of additional discovery on the nonmoving party is small and not disadvantageous, courts generally grant motions to amend. *See, e.g., United States v. Cont'l Ill. Nat. Bank & Trust Co.,* 889 F.2d 1248, 1255 (2d Cir.1989); *Lawrence v. Starbucks Corp.,* No. 08 Civ. 3734, 2009 WL 4794247, at *4 (S.D.N.Y. Dec. 10, 2009). The addition of new plaintiffs in this case is non-prejudicial and would cause minimal delay, and therefore the Court permits joinder. *See Oneida Indian Nation of New York v. City of Sherill,* 337 F.3d 139, 168 (2d Cir.2003).

**VI. CONCLUSION**

Based on the foregoing discussion, it is hereby:

**ORDERED,** that Defendants' Motion (Dkt. No. 214) for Summary Judgment is **DENIED;** and it is further

**ORDERED,** that Plaintiffs' Motion (Dkt. No. 209) for Partial Summary Judgment is **GRANTED in part** and **DENIED in part.** The Court finds that there is no genuine issue of fact as to the assertion that "the black community in the County of Albany is sufficiently large and geographically compact to form five majority-minority districts." There are unresolved issues of material fact as to all other elements of Plaintiffs' claims; and it is further

***16 ORDERED,** that Plaintiffs' Motion (Dkt. No. 226) for leave to amend is **GRANTED in part** and **DENIED in part.** Plaintiffs may file a second amended complaint within seven (7) days of this order to add proposed plaintiffs Vicente Alfonso, Stephanie Davis, and Elaine Frazier; and it is further

**ORDERED,** that Defendants may schedule deposition of Vicente Alfonso, Stephanie Davis, and Elaine Frazier within thirty (30) days of the filing of Plaintiffs' Second Amended Complaint; and it is further

**ORDERED,** that the Clerk serve a copy of this Memorandum–Decision and Order on all parties.

**IT IS SO ORDERED.**

**All Citations**

Not Reported in F.Supp.3d, 2014 WL 316703

**Footnotes**

1 Although Plaintiffs have filed the second Motion to Amend, they make no amendments to the factual allegations in the Amended Complaint. *See generally* Mot. Am. Therefore, the Court will consider the Amended Complaint to be the operative pleading for purposes of deciding the summary judgment Motions, and then resolve the Motion to Amend.

2 Defendants argue that the Court should not consider a black-only "claim," because it was not fairly raised in their pleadings. *See* Defs.' Resp. As discussed below, Plaintiffs' complaint explicitly states only one cause of action, but fairly supports two theories to prove that cause of action. Furthermore, Defendants' arguments in their preliminary injunction briefing indicates that they understood the Plaintiffs would attempt to prove their claim using a black-only theory.

3 The parties use "Non–Hispanic DOJ Black" to mean the simple sum of the Census responders identifying as "Black of African American alone" and "Two Races: White; Black or African American." Pls.' SMF ¶ 42. The Court recognizes that this definition does not include Hispanic individuals that may identify as black, nor multiracial individuals identifying as a combination of races other than "White" and "Black or African American," and thus may not be fully inclusive of the population that identifies as black. However, this definition ensures that the operative black and Hispanic populations do not overlap for purposes of VRA litigation.

4 The Plaintiffs contend that an additional definition, "any part black," is the proper definition of black for the purposes of a black only claim. Pls.' Mem. at 3 n. 8.

5 The Court may take judicial notice of government statistics. See FED.R.EVID. 201; *United States v. Esquivel,* 88 F.3d 722, 726–27 (9th Cir.1996).

6 The Census data does not delineate a "Two or More Races: White; Black or African American" category for the voting-age population. Rather, the above range employs the nonHispanic "Black or African American" population as the minimum, and the sum of the nonHispanic "Black or African American" population and the non-Hispanic "Two or More Races" population as the maximum. The actual population is somewhere in the middle, because the "Two or More Races" VAP includes the "White; Black or African American" VAP that would be used to calculate the DOJ black VAP.

7 There are currently 4 MMDs out of 39 total districts, which equates to 10.26 percent. The black VAP consists of between 10.75% and 12.08% of the total VAP using a non-Hispanic DOJ black definition. Using an "any part black" definition, which includes black Hispanic individuals and additional multiracial individuals, would result in a higher number. The combined black and Hispanic VAP consists of between 14.87% and 16.20% of the total voting population. Plaintiffs' proposed changes would cause MMDs to comprise 12.82% of the total districts.

8 Dr. Liu analyzed single-member elections using "Ecological Inference," which purportedly improves upon the bivariate ecological regression technique employed in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), because it does not assume homogeneity or produce impossible estimates. *See* Liu Report at 4–5; 478 U.S. at 52–53. For multi-member districts, Dr. Liu used "homogeneous precinct analysis" because "[Ecological Inference] methodology is not useful" where voters elect more than one candidate at a time. *Id.* at 5. "Homogeneous precinct analysis" is another term for the "extreme case analysis" employed in *Gingles. See Gingles,* 478 U.S. at 53; *Montano v. Suffolk Cnty. Legislature,* 268 F.Supp.2d 243, 254 (E.D.N.Y.2003).

9 Because Mr. Cooper drew his estimates from the American Community Survey (the accuracy of which the Court addresses in footnote 15, *infra* ), the demographics presented in Mr. Cooper's overlap somewhat—the "African–American" category contains black Hispanics, as does the "Latino" category. Cooper Supplemental Decl. ¶ 8.

10 The Court notes that the sixth MMD only achieves a majority of minority voters when combining all minority groups —not just blacks and Hispanics—and only reaches 50.18% minority voters.

11 This section addresses only the standing of Plaintiffs under the Amended Complaint. The standing of the proposed Plaintiffs in the Motion to amend is discussed *infra.*

12 This concept is related to, but distinct from, proportional representation, to which Section 2 does not provide an unfettered guarantee. *Johnson v. DeGrandy,* 512 U.S. 997, 1014 n. 11, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994).

13 No circuit has developed a framework specifically for a Section 2 standing inquiry. Plaintiffs cite two unpublished district court decisions, *Broward Citizens for Fair Dists. v. Broward Cnty.,* No. 12–60317–CIV, 2012 WL 111053 (S.D.Fla. Apr. 3, 2012), and *Barnett v. City of Chicago,* No. 92 C 1683, 1996 WL 34432 (N.D.Ill. Jan.29, 1996), in support of standing in similar factual circumstances. Other circuits have declined to review standing where *Gingles* factors were not met. *See, e.g., African Am. Voting Rights Legal Def. Fund, Inc. v. Villa,* 54 F.3d 1345 (8th Cir.1995).

14 Although Defendants correctly assert that *Hall v. Virginia,* 276 F.Supp.2d 528 (E.D.Va.2003) extended *Hays* to a Section 2 claim, that court did so on rather unusual facts. In that case, the class of plaintiffs included individuals that had resided in the former influence district in the past, but did not reside there currently, and did not allege that they should be part of the influence district, or that their situation should change at all. *Id.* at 531. Because they established no link to the actual redistricting process, they had no standing to assert a claim. *Id* . at 531–32. The plaintiffs in that case also sought to restore an influence district by returning the black population to 40%. *Id.* at 529–30. Indeed, the opinion goes to lengths to distinguish the Hall facts from a situation where voters seek to establish a former influence district as an additional MMD. *See, e .g., id.* at 530 n. 4.

15 Defendants draw an analogy between coalitions of minorities voters and crossover districts, where a minority group combines with a subset of the majority to elect candidates of its choosing. Defs.' Mem. at 20–22. Defendants rely on the plurality opinion in *Bartlett v. Strickland,* 556 U.S. 1, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009). Defs.' Mem. at 20–22. However, the analogy fails for several reasons. First, *Bartlett* explicitly distinguishes the two types of claims. *Bartlett,* 556 U.S. at 13–14. Second, the combination of minority groups goes beyond "political alliance," Defs.' Mem. at 24; the Section 2 action addresses discriminatory treatment on the basis of historically disadvantaged race. *Bartlett,* 556 U.S. at 10. Finally, rather than *lacking* power because of a political structure, the minority group in *Bartlett held* political power only because of a political structure. *Id.* at 15. Thus, by seeking to re-create the crossover district by relying on white crossover voting, the minority group in *Bartlett* may actually be demonstrating that the third *Gingles* factor, racial bloc voting usually sufficient to defeat the minority candidate, is not present. *Id.* at 16 (plurality opinion); *id.* at 34 (Souter, J., dissenting).

16 Courts within the Second Circuit have likewise recognized minority coalition claims. *See Rodriguez v. Pataki,* 308 F.Supp.2d 346, 405 (S.D.N.Y.2004); *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany,* 281 F.Supp.2d 436, 445 (N.D.N.Y.2003); *France v. Pataki,* 71 F.Supp.2d 317, 321–22 (S.D.N.Y.1999).

17 The context of the appeal does not diminish *Bridgeport'* s value here. Although the Second Circuit reviewed a preliminary injunction for abuse of discretion, the *Bridgeport* panel recognized the significance of a grant of preliminary injunction and reviewed the trial court's decision within that lens. 26 F.3d at 274. The panel remarked that it "recognize [d] the urgency of the City's contention that the prerequisites for the issuance of a preliminary injunction in voting rights cases be scrutinized carefully." *Id.* The court then found that the plaintiffs had sufficient evidence to support that they were likely to succeed on the merits.

18 *See, e.g.,* Dkt. Nos. 232–6 ("Declaration of Joseph Gomez"); 232–7 ("Declaration of Nathan LeBron"); 232–10 ("Declaration of Elaine Frazier"); 232–11 ("Declaration of Ladan Alomar"); 232–12 ("Declaration of Corey Ellis"); 232–14 ("Declaration of Vicente Alfonso").

19 Denial of summary judgment due to a failure to identify empirically a minority-preferred candidate for the entire racial group, without additional support, also defies the *Gingles* directive to "rely on other factors that tend to prove unequal access to the electoral process" where "a minority group has begun to sponsor candidates just recently," as Hispanic voters have here. 478 U.S. at 57. Thus, although such an argument could be relevant in defeating Plaintiffs' coalition claim at trial, the Court cannot award summary judgment on that ground. *See Ruiz v. City of Santa Maria,* 160 F.3d

543, 559 (9th Cir.1998) ( "Plaintiffs ... are not required to *prove* any of the three preconditions in opposing a motion for summary judgment; they need only show a genuine dispute of material fact").

20 Defendants do not dispute that Plaintiffs properly raised a coalition claim.

21 This is the only relevant analysis. Defendants' second argument—that a district in one of Plaintiffs' illustrative plans, the AHEJ plan, is irregularly shaped—goes beyond the "objective, numerical test" that the Supreme Court intended at this stage of analysis. *Bartlett,* 556 U.S. 18.

22 The Census Bureau acknowledged that its American Community Survey, a collection of survey estimates on statistics such as CVAP, is less reliable than Census data and not intended to be used in redistricting. U.S. Census Bureau, *Three Tips for Using American Community Survey (ACS) Data,* http://www.census.gov/acs/www/guidance_for_data_ users/guidance_main/.

23 While that is true-both in that Plaintiffs have not showed that not all of the City's black residents are citizens and that the citizenship rate may reasonably not be 100%—it also does not guarantee that the VAP and CVAP are different. Rather, for the VAP and CVAP statistics to diverge, the citizenship rate of black County residents over 18 years of age must be less than the citizenship rate of the population as a whole. Defendants have not provided evidence that could reasonably allow that conclusion.

24 Defendants further assert that "Plaintiffs have not addressed the impact of disenfranchised felons on CVAP." Even if the Court were to accept as true the bare allegation that the County's black population contains a disproportionate number of felons, to deny relief on such basis would be irresponsible. To potentially penalize a minority group seeking to reform one structural issue, an abridgement of voting power, because of the existence of another societal issue, racially correlated felony rates, would directly counteract the VRA's "broad remedial purpose." *Chisom,* 501 U.S. at 403.

25 "Any part black" and "non-Hispanic DOJ Black" differ in that the former includes black Hispanics and multiracial individuals that are part black. If these demographic groups vote differently than non-Hispanic DOJ Black individuals, the statistical cohesion observed by Dr. Liu could be upset.

26 A finding that a *subset* of a minority group is sufficiently numerous and geographically compact to form a majority of the proposed number of MMDs necessarily implies that *all* members of the minority group can form a majority within the same geographic area.

27 Defendants also argue that the Motion to Amend is in bad faith and futile, because neither the current nor the to-be-added Plaintiffs have standing to sue. But as discussed *supra,* the Court has found that all current Plaintiffs in this action possess standing to bring a Section 2 claim. Defendants' Opposition also brings other arguments based on standing defects in Plaintiffs' previous pleadings. *See, e.g.,* Mot. Am. Opp. at 3–4. The Court does not reconsider these arguments in the context of the Motion to Amend.

28 The Court makes no determination of whether the coalition claim could proceed without a new Hispanic plaintiff to replace Ms. Gonzalez, as there is no precedent on that issue. However, to expose Plaintiffs to that unforeseen risk at this stage of the litigation would not further justice when the original group of Plaintiffs could have brought the claim.

**End of Document**

# EXHIBIT B

But be able to display that data in addition to population to kind of gauge where the Commission is.

>> KIM BRACE: So what you have is on your spreadsheet your active matrix down there you have the racial and demographic characteristics and the overview tab.
And then the individual racial groups in the other tabs.
So if you wanted, again, it's the option of how you wanted to see race.
Remember what I've said before, so if you want to use a combo or the maximum it could be in terms of for example the African/American compared to the alone category of non-Hispanic African/American, here is where you start seeing the differences here.
So on the alone African/American is 2.7%.
In this District that you have drawn.
But in the combo, it's 3.86%.
So you see how the different definitions of your racial groups change.
And that's sometimes is important to recognize on that side.

>> COMMISSIONER CLARK: Can we get Lisa's assessment and then Bruce's assessment of this District?

>> KIM BRACE:

>> MS. JULIANNE PASTULA: Mr. Chair?

>> COMMISSIONER WITJES: General Counsel Pastula.

>> MS. JULIANNE PASTULA: And Mr. Brace has the racial census data displayed and the percentages that correspond to the draft District that's displayed.
The analysis from Dr. Handley and Mr. Adelson will, in fact, come later, after, again, I believe Dr. Handley is scheduled to give her presentation on September 2nd, which will be again a statewide look and then focusing in on the areas with significant minority population to analyze whether there is racially polarized voting in those areas.
So that data will come later.
I think one thing and I know Mr. Adelson has taken off his mask, the largest cue that someone wants to speak in these meetings, but I would also say that moving from the racial data aspect of it just momentarily is if the display if we could see the voting age population just of total population the voting age and some of the other categories for this proposed, this draft District excuse me the draft District that is displayed.
Thank you, Mr. Chair.

>> KIM BRACE: So in the voting age population you look at this one, voting age of alone is 2.67 and of voting age of combo for the African/American is 3.24.
So it's not as much of a difference on the voting age as it is in total population on that side.

>> VICE CHAIR SZETELA: Mr. Adelson?

>> I wanted to address Commissioner Clark's comments about the analysis.
Big part of the analysis is election results and analysis.
That's not here.

I know that that's something that Dr. Handley is looking at and she and I will be talking about.
So to your point, I agree that that can be a very significant part of the analysis.
But that's part of the data that we talked about earlier that isn't here yet.
When it comes, great.
But also just keep in mind anecdotally in looking at voting act rights issues and ability to elect candidates of choice that often involves looking at what is the size of the minority age population is it 10%, 20%, 40%, 50%, the higher you go the likelier, the greater the opportunity for minority voters to be able to elect candidates of choice.
That all is part of Dr. Handley's analysis which we will then use in various ways but it's kind of a good thumbnail.
The smaller the population anecdotally for now is probably less likely that that population generally will be able to elect candidates of choice.
Thank you.
>> VICE CHAIR SZETELA: All right where to now Commissioner Clark?
>> COMMISSIONER CLARK: You want me to continue with this?
>> VICE CHAIR SZETELA: Yes.
>> COMMISSIONER CLARK: I didn't know if we were going to pass the baton.
That's what I was thinking Hillsdale is 45746 and Jackson is 16366.
Okay, so I want to get those two counties.
>> KIM BRACE: Hillsdale.
We will put this into District two.
>> COMMISSIONER CLARK: Yep.
>> KIM BRACE: Okay, and Jackson.
>> COMMISSIONER CLARK: Correct.
>> MS. SARAH REINHARDT: Commissioner Clark?
>> COMMISSIONER CLARK: Yes.
>> MS. SARAH REINHARDT: Can you clarify if you started drawing the second District? Is this the second District?
>> COMMISSIONER CLARK: It is.
>> VICE CHAIR SZETELA: It is.
>> MS. SARAH REINHARDT: Just to clarify and the Commission can proceed how it wants but the drawing of the second District the subsequent District would move on to the next person in alphabetical order.
>> VICE CHAIR SZETELA: So we will move on to Juanita? Juanita wants to pass, so that brings us to you, Commissioner Lett.
I know you only have ten more minutes left so you will have to be speedy, I guess.
>> COMMISSIONER LETT: Hillsdale and Jackson highlighted.
>> VICE CHAIR SZETELA: Microphone too.
>> VICE CHAIR SZETELA: Thank you.

# EXHIBIT C

# DISSENTING REPORT
## Submitted by Commissioner Erin Wagner

This serves as my dissenting report for the Michigan Independent Citizens Redistricting Commission 2021 Final Proposed Maps.

From the start of my term on this commission, I have been interested in fair maps for ALL of Michigan's citizens, not just a few parties, or even the party that I affiliate with. I have read every public comment both on and off the portal and looked at every map submitted. At one point, I even asked General Counsel Pastula if the maps submitted by the citizens to the portal had been vetted by any of our "expert panel" of witnesses (specifically the Promote the Vote maps, in relation to VRA and the other criteria) so that I could use portions of those in relation to drawing my own and was told they had not been.

One of the main reasons I voted for EDS was because they offered to supply a QR code during the live mapping process where anyone could pull it up and see and comment upon exactly what we were doing at the time, yet when I brought that up, I was told that since MDOS had a contract with Professor Duchin, EDS would not be supplying a QR code.

I do not believe that these maps best serve the Citizens of Michigan and feel, as I stated a few times, that we should have spent more time than we allotted to come up with maps that were truly fair to everyone, while meeting all criteria. In my entire lifetime here in Michigan, we have been neither Red nor Blue, swinging between the two parties frequently in our voting decisions. To be fair is to slice up the "pie" so that everyone gets the same size piece. These maps do nothing of the kind. When we were mapping in relation to the importance of the criteria, I believe we were on the right path. When certain organizations started crying out about partisan fairness, I believe we then went off on a strictly partisan tangent and discounted most all the other work we had done, especially in relation to Communities of Interest (hereon referred to as COI's) as well as County boundaries.

When it came time to vote, we were forced to choose one of the subpar maps that were proposed. If we didn't agree that any of them be put forth to the public and the 45-day comment period, we should have been allowed to vote no confidence. I believe we should have taken more time, as numerous public commenters told us, to come up with maps that every Commissioner could confidently say were our best work.

Some examples as to why I voted against the proposed maps include, but are not limited to the following:

Chestnut:

Chestnut groups Grand Rapids with Grand Haven, Norton Shores and the like on the far west coast of Michigan, as well as extending into Muskegon. It divides three counties to make the 3rd Congressional

District and lumps different COI'S together. District 2 extends south beyond notable county boundaries to include 20 different counties, which are in NO way communities of interest. District 8 takes areas from five different counties to lump Midland with Bay City and Saginaw. District 7 includes six different counties encompassing rural areas such as Fowler, Charlotte, Olivet, Eaton Rapids, as well as Fowlerville, Howell and Brighton. Coming from this area, we have nothing in common with Howell, Brighton or the capitol of Lansing, aside from traveling there on occasion.

Linden:

The Linden map is laughable in that once again it groups rural areas with the capitol of Lansing in district 21 and places East Lansing, with rural Eagle, Westphalia and Williamston. Williamston and Webberville are a COI, yet it splits them to place Webberville in District 22 with Howell and Brighton. District 30 grabs from the west yet again. District 33 places northern areas, such as Baldwin and Sauble with areas such as Portland and Ionia which are in the middle of the State and much closer to Lansing, Grand Ledge and the like. Once again, Midland is grouped with Bay City and Saginaw, completely discounting a COI. Detroit areas seem to reach much farther north than Communities of Interest would warrant. Detroit's voice was by far the largest and loudest and yet we still seem to have allowed that voice to fall on deaf ears. District 36 extends from the Northeast tip of the lower peninsula down to the Huron Manistee National Forests on the Western side of the lower peninsula, dipping down to grab Pinconning in Bay County.

Hickory:

In the Hickory map, even though we heard numerous COI testimony to keep the Grosse Pointes in the same district as Harper Woods, Saint Clair Shores and nearby Detroit neighborhoods such as Morningside, East English Village, Jefferson-Chalmers, it slices Harper Woods from District 10 and includes it with District 11. Morningside is included in District 9, while District 10 extends beyond East Village to include everything southeast along the Detroit River and cuts off on the northeast side before St. Clair Shores.

Ann Arbor is split in to four districts, 47, 33, 23, and 49. Lansing's District 77 uses the Grand River along Moore's River Drive as most of its southern boundary, north to W. Cutler Road just north of Dewitt, then west and north again to include Westphalia and Eagle (areas which do not have the same interests as Lansing, and dips into Eaton County to grab Grand Ledge. District 76 includes the northeast tip of Eaton County, which is considered Lansing, grabs Vermontville (an area with a high concentration of Amish) yet leaves out Kalamo and Bellevue, with Bellevue being just west of Olivet about 5 minutes by car.

It splits Nashville, Hastings and Delton, all within Barry County into three separate districts and includes Bellevue in Eaton County with the Western portion of the State in District 43. Barry County is split three ways, and Eaton County is split in four ways.

As stated, these examples are not the ONLY problems I see in the proposed maps.

Another reason I dissented on these maps is because of the numerous times, as a Commissioner attending remotely, I watched the Commission take breaks and then come back to pass a motion regarding commission business, that was not part of the discussion that took place prior to said break and therefore remote Commissioners were not privy to any discussion. Unfortunately, this called into question the whole matter of “transparency “ for me.

I understand that we could not make everyone happy, however I believe had we spent more time in revising maps according to public comment, we could have done a much better job than what we put forth.

Sincerely,

Commissioner Erin Wagner

# EXHIBIT D

# Dissenting Report for Adopted Congressional, Senate and State House Maps

Commissioner Rhonda Lange

Michigan Independent Citizens Redistricting Commission

Abstract

This report is an evaluation and assessment of why I objected to the recently adopted plans and details not only my personal opinions on the plans' creation but facts on input that the public gave that were ignored. I will not go into detail as to why I voted for other maps such as the Lange Congressional and Senate plans as the short and direct answer is I was told I HAD to vote for one. My personal choice would have been to not vote for any or abstain from voting due to not believing that we had reached truly fair maps that represented the voices of the public that we heard from. My stance was and still is that the Commission should have taken more time to work on maps and that none of the maps were truly fair.

Dissenting Report for Adopted Congressional, Senate and State House Maps

**Congressional Plan Chestnut**

The Congressional Chestnut Plan does a complete disservice to parts of Northern and Central Michigan. For example, District 2 takes the west coast of the state and runs it over and down to within two counties of the southern border of the state, which clearly is not compact and splits a total of six counties unnecessarily, which also goes against the criteria of considering county and township lines. District 8, while splitting three counties, needlessly splits off a township in Tuscola to add it to District 8 while splitting off a small township in Genesee County, that is in District 8 and putting it in District 7, again discounting county lines. District 3 needlessly splits three counties and ignores input about communities of interest. Such is the case with Districts 4 and 5. I will say that the SE part of the state, including Districts 6, 10, 11, 12 and 13, while not perfect from a split point of view due to population, I have no issues with; however, from a COI, it is my opinion that the Commission failed, especially as it relates to the African American population.

**Michigan Senate Linden**

The Michigan Senate Linden Plan does a disservice to "some" citizens of Michigan. While in the Senate plan Northern Michigan is a little more compact, once you get to Districts 33, 34 and 31 multiple counties are needlessly split to make up districts. Districts 33 and 34 both have five county splits and consist mostly of rural areas that do not have high populations, so those splits are both unwarranted and unnecessary. While public comment about COIs for those areas was minimal due to a lack of outreach in my opinion, the comments that were received should have been taken into account. District 17 needlessly splits four counties in mostly rural areas and discounts the COI testimony given for those areas in my opinion. District 22 needlessly splits

five counties. As for districts 1-13, my opinion is the same as it was for the Congressional maps in that area. It is my thought that VRA could have been accomplished in conjunction with COI and I will expound on this in my conclusion. Allegan County is split needlessly three times and Ottawa County is split needlessly two times after hundreds of comments from its residents about the county being a COI and from what I saw maybe one or two (I distinctly remember one) views that felt otherwise, yet they were split, and it was said that was a "compromise" when there was no need for it. The Commission split up three counties so that 3 cities could be considered a COI in District 35. It can also be argued that District 15 could have been accomplished in one county without taking a chunk out of Lenawee.

**State House Hickory Plan**

State House plan "Hickory" is the worst offender of them all not only in my opinion disenfranchising African American voters but as well as rural voters and voters in Northern Michigan. The U.P. commented that their counties are their COI and not to split them. District 107 needlessly splits three counties. District 104 is one of the most egregious splits in Northern Michigan, splitting 6 counties and not in the name of COI! District 110 splits two counties. While I drew this district, upon going back and editing and reviewing COI, I found it could have been redrawn in a way that kept counties whole and still maintained COI and county boundaries. District 97 splits four counties. Jackson County was split four times, which is completely unacceptable, and their voices were ignored when they expressed that their county WAS/IS THEIR COI. Even if they were over population for one house district, every attempt should have been made to do the least number of splits to maintain their COI. District 28 goes into Monroe County and the voices of those from Monroe County were ignored. In looking at this district it

could have been maintained in Wayne County. District 43 splits four counties and is not compact. Lapeer County, which again is mostly rural, was split three times unnecessarily. Then we move into SE Michigan: Macomb, Oakland, and Wayne counties. We as a Commission failed this area horribly. It is my opinion that not only with the overwhelming amount of input from the citizens, especially the African American community but also the overwhelming call from the communities for us to keep drawing and have their voices better represented, we should have made additional changes. It's my opinion that doing mediocre work is not OK when that work will affect communities for 10 years.

***Conclusion, Summary, Evaluation of Process including ranked criteria, public comment, etc., and my personal opinions on the work that got us to these maps.***

It is my belief, based off just the minimal examples expressed in the body of this report, that the Commission failed in its duty to draw fair maps. It is also my belief based off not only what I saw but also heard, that there was a definite bias not only politically but also geographically and racially in the drawing of these maps both in favor and against. It is my belief that the Commission did not take into consideration all the ranked criteria when evaluating each criteria, making sure each was met simultaneously. While some criteria such as political fairness had to be evaluated once an entire map was completed, the others could have and should have been looked at sincerely after each district was drawn. The excuse that time was a factor when you have citizens from both sides of the aisle and all over the state saying that the maps needed more work is unacceptable. The citizens spoke and said they did not want these maps for the next 10 years and "we" ignored that because of time. It is my opinion that when the maps were being

drawn based on COIs, the Commission was doing a fairly good job, but once it got to political fairness things went off the track, by our own expert's opinion and court case evaluation. ACCEPTABLE measures would be:

Lopsided Margin: Less than 8%

Mean Median: Less than 5

Efficiency Gap: Less than 7%

The Commission took these numbers to an extreme at the cost of breaking up COIs and, in my opinion, intentionally diluted the votes of rural populations by combining them with heavily populated urban areas that voted in a distinct way. It was also stated openly in a meeting by a commissioner that Northern Michigan was mostly white and really didn't have any diversity. That statement showed, in my opinion, there was bias and discrimination toward people in Northern Michigan, which consists mostly of rural areas.

When looking at criteria for SE Michigan, particularly those in the Detroit area, of course, the first is VRA, which we were given guidance from Mr. Adelson. While I personally did not agree with his and Dr Handley's evaluation, I am not an expert and did not object either. Where I think the Commission failed in this aspect with the maps is that we should have not only considered VRA (or possibly gotten a second opinion) but combined it with COI. The citizens of Detroit, especially African American citizens, came out in strong numbers about their COI, even listing exact streets in some cases. I think these maps failed because we listened to our experts and a set of proposed numbers over the voices of the citizens of the state who were told they would get to pick their representatives by having their communities of interest kept intact. In using the term "cracking and packing" as it relates to VRA, packing is the "INTENTIONAL" act

of concentrating a group to reduce their voting power. I believe we as a Commission could have listened to the African American community and given them the districts that they asked for based off of the COI standpoint, regardless of if those districts were at 51% or even higher as long as it was what the community asked for, but we didn't.

This brings me back to criteria 3, COI. We as a Commission received a lot of public comments on what citizens saw as their COIs. I feel that in drawing these maps the Commission showed a serious lack of consistency in what they saw as being acceptable for COI and, in my opinion, treated different areas of the state in different ways. Maybe this was unintentional, but it happened. Point of fact: the Tri-Cities (Midland, Saginaw, Bay City). The Commission decided that three cities in three different counties was a COI and drew it to be such in two maps based off of one set of public comments for the area; Ottawa County literally had hundreds of comments, including a petition saying that the entire county was their COI, and gave examples of why, and the Commission intentionally split the county unnecessarily and then had a commissioner say it was a "compromise" when there was no need for compromise to the best of my knowledge. I only recall one written comment against the whole county being a COI. I drew maps that made Northern Michigan more compact and considered the COIs that were given for what I will call Central Northern Michigan and the Commission ignored what people in those areas said. A lot of the rural areas stated that their county is/was their COI and the Commission balked at that idea while saying that three cities in three different counties was a COI; again, there was a lack of consistency. I must agree with a lot of the public comment when they said their COI is their county, especially in rural areas where the population is not as condensed. It is my opinion that it is no different than saying, for an example, a five-block radius in Detroit that might hypothetically have 20,000 people is a COI because they have the same issues as far as

economics, environmental, etc. It is no different for a county that has 20,000 people; the issues may be different, but the community still exists.

As for the criteria of favoring or disfavoring an incumbent, while I cannot speak for anyone but myself on this particular criteria, I can say that I did not look at any incumbent data as far as who represented what district in the old plans, were incumbents drawn out of new plans, etc. To make sure of this, I asked that Mr. Woods, the Communications and Outreach Director, not to send me any newspaper articles, at the advice of Legal Counsel Pastula, as it was said articles were being published that talked about incumbents and the districts they were in. I cannot speak to what other commissioners have or have not done regarding this criteria.

Criteria 6: Districts shall reflect consideration of county, city and township boundaries. As described in the subsections of this report in regards to each set of maps, I think I have more than shown in the few examples given that as far as Criteria 6 is concerned, the Commission did an extremely poor job of considering this criteria, especially in rural areas where being split multiple times for no constructive reason negatively affects their representation, and again most rural areas came to this Commission and specifically stated that their county was/is their COI and their voices were blatantly ignored.

Last Criteria: Districts will be reasonably compact. Again, just by looking at the examples I gave for each map, it is easy to see that this criteria was not met. I did a map that outperformed all other maps, including the current Legislative maps, when it came to this criteria that could have at least been considered for certain areas.

In closing, I would like to give my final perspective and opinion as it relates to the process, the work performed, and the concerns I have that I think could have influenced the maps as they were adopted.

First is the outreach. I was very vocal throughout this process on how I feel the outreach for the rural communities was not given as much commitment, time, or funds as the urban and more populous parts of the state. I repeatedly asked our Communications and Outreach Director to reach out to certain areas or groups, to which he said he would but never produced. I was told that there were lots of town halls done in rural communities, yet when the list circulated it was shown not to be the case. It is my opinion that there was extreme bias in the outreach. When it came to public hearings, I feel it was always quickly recommended to cut potential rural venues even though having only two for all of Northern Michigan, including the U.P., would make it harder for people to participate in person, especially in areas where internet could be considered spotty at best, which also limited access to participating online. The Commission approved funds requested by the Communications Director to hire an "influencer" to get more people to the Flint hearing because he felt turnout the first time around wasn't great but did not give the same considerationto any other areas. It is my opinion that areas picked for public hearings were very politically biased and a better job could have been done to make sure it was more of an equal mix.

Next is transparency. I have grave concerns on this issue. It is my belief by things I saw, things I personally heard, and things that I read that transparency was lacking! I also believe the public comment portal was a mess. I asked repeatedly if there was a way to make it easier to navigate as a commissioner and print out public comment, and the use of "hashtags" to help search … really? If you don't know what the public is going to use for a hashtag for a particular area, how do you know what to search? Also, I had issues with not getting attachments that were uploaded to the portal in a timely fashion (I'm still waiting on recently uploaded material from January).

This whole process has honestly saddened me and proved to me what my concern was all along for this amendment and what is "fair." I would dare ask is it "fair" that the African American population came out in strong numbers and told us what they wanted, and we didn't provide that? Is it fair that rural communities came out and told us what they wanted (some driving long distance) and we ignored it? Is it fair that the only two considerations that were given to the U.P. were trying to combine two cities (again in different counties) to make a district and the second being looking to try not to split the Native American population — which don't get me wrong, I am fine with that — but in turn didn't listen to the other voices we heard from? Is it fair that organized groups' voices were heard louder and dare I say drowned out the voices of lone citizens who took time off from work or drove long distances and sat for hours just to be heard? The list goes on and on. I realize we absolutely couldn't make everyone happy but more serious and unbiased consideration should have been given to all.

While I think these maps are truly not representative of the entire state and the input we received, if anything good comes out of this I hope that future commissions really listen to the public not about politics but about the people's needs, their communities, their beliefs, and that they don't judge or show bias toward them for that because in the end I think all anybody really wants is to live their lives to the fullest the way they see fit.

This will conclude my report. While I can go on and on about my experiences and things I observed, heard, etc., this is not the place to do it, although on a personal privilege note, I know that commissioners do not particularly care for me and that's OK. I volunteered for this Commission to do a job and if I feel something isn't right I'm going to say it, regardless of if it goes against the views of others or the narrative, because I am a member of this Commission like it or not and my job was not to make the Commission happy and portray a narrative to the

media just to advance the career of someone or so some organization could win a Pulitzer or any of the other B.S. that was floated my way, stuff that I repeatedly said I could not care less about. The only reason I applied for this position was I wanted to make sure of two things and that was that the maps were fair for EVERYONE in the state from the very northern tip of the U.P. to the very SE corner of the Lower Peninsula and to make sure that everyone's voice was heard and considered EQUALLY! I feel that as a Commission we failed and for that I truly apologize to all the citizens of the State of Michigan.

Commissioner Rhonda Lange

# EXHIBIT E

Commissioners not pictured: Anthony Eid, Rhonda Lange, and Erin Wagner

# LESSONS LEARNED & RECOMMENDATIONS

## From the Inaugural Commission

October 2022

MICHIGAN INDEPENDENT CITIZENS REDISTRICTING COMMISSION

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# COMMUNITIES OF INTEREST

One of the most complex and difficult challenges the MICRC faced during the map-making process was defining "communities of interest," which is the third-ranked priority in the state constitution preceded only by complying with federal population size and Voting Rights Act requirements and a directive to make districts geographically contiguous.

The guidance provided in the Michigan Constitution is as follows:

> **"Districts shall reflect the state's diverse population and communities of interest. Communities of interest may include, but shall not be limited to, populations that share cultural or historical characteristics or economic interests. Communities of interest do not include relationships with political parties, incumbents, or political candidates."**

MICRC members noted during interviews there is no definitive list of communities of interest in Michigan to draw from, and a community of interest is not a traditional city or county borders. In order to fulfill this criteria, the MICRC identified a communities of interest process.

This process included identifying characteristics of a COI to be:

- Self-defined by the local community members.
- Associated with a contiguous area on a map.
- Shared common bonds linked to public policy issues that would be affected by legislation, likely to result in a desire to share the same legislative district in order to secure more effective representation.

And defining "cultural," "historical" and "economic" characteristics as:

- **Cultural**: Artistic and intellectual pursuits/products, including the arts, letters, manners; ways of living transmitted from one generation to the next; a form or stage of civilization; behaviors and beliefs characteristic of a social, ethnic or age group.
- **Historical**: Past events and times relating to people, country or time period; aggregate or record of past events; a notable past; acts, ideas or events that will shape the future.

- **Economic**: The production, distribution and use of income, wealth and commodities; affecting or apt to affect the welfare of material resources; financial considerations; wealth and wage disparities.

Communities of interest could include places of worship, neighborhoods, ethnic communities, social service organizations, local historical societies, school districts, outdoor recreation areas, arts and cultural institutions or a group of vacation homeowners.

Communities that have a shared interest that makes them want to stay together in one district for purposes of political representation can tell MICRC where they want to be located geographically. MICRC did consider the maps it received from communities of interest when drawing the new congressional and legislative lines. However, it didn't consider COIs where citizens mentioned not wanting to be a part of a community.

While many states consider communities of interest, no other state assigns them such a high priority in its criteria for redrawing districts as Michigan. Redistricting experts interviewed for this report said making communities of interest a top priority was meant as a corrective to gerrymandered districts that split up communities in the past. Groups including Voters Not Politicians, the Michigan Nonprofit Association and the University of Michigan's Center for Local, State, and Urban Policy compiled resources to learn more about communities of interest and how to encourage public participation in the new redistricting process.

One of the main factors MICRC has to consider is keeping residents with similar interests together. Because the definition is so vague, Michigan citizens have a lot of leeway to help chart MICRC's course.

"It's very elastic," John Chamberlin, professor emeritus of political science and public policy at the University of Michigan's Ford School of Public Policy, told the MLive newspaper chain in a story published May 25, 2021. "As long as you're not a political party or a front group for a candidate, you could be a community of interest."

According to the National Conference of State Legislatures, 25 states, including Michigan, currently include communities of interest as a qualifying form of criteria in drawing state legislative maps, congressional maps or both. The most comparable system to Michigan's is the state of California, which also has an independent redistricting commission that relies in part on communities of interest.

The term itself isn't unusual for people who are familiar with the redistricting process, but for the average citizen it's nebulous, Chamberlin told MLive.

He and other researchers at the University of Michigan's Center for Local, State, and Urban Policy drew up a list of examples for MICRC review of what communities of interest could be after looking at various state organizations, associations and groups. They suggested communities of interest include populations sharing cultural or historical characteristics, economic interests or bonds through policy issues that would be affected by legislation.

"The fact that there's no exhaustive list of these things means that either communities of interest, on their own, need to decide, 'We are one and let's participate,' or some other group needs to get in touch with them to say, 'Have you thought about this? Here's how the process works,'" he told MLive.

In remaining steadfast and not disregarding the seven ranked redistricting criteria, the MICRC heard sentiments of former state Supreme Court Justice Stephen Markman. He teaches constitutional law at Hillsdale College, which commissioned him to write a report summarizing his concerns with the MICRC's definition of community of interest in forming district lines.

Markman urged the MICRC against using racial, ethnic or religious groups as a determiner of the state's new voting boundaries for the 2022 election. He also said a redistricting commission that prioritizes traditional municipal boundaries when redrawing voting maps should avoid using "'racial, ethnic and religious' calculations" as proxies for drawing maps that provided partisan advantage in the past.

Instead, Markman called on the commission to consider actual neighborhood and municipal boundaries when redrawing the state voting maps instead of more nebulous bonds such as shared concerns over the environment, creative arts communities, media markets or tax assessment districts — elements the University of Michigan study offered as examples of "communities of interest."

Here is a link to a July 7, 2021, story published by The Detroit News about Markman's views.

# COMMUNITIES OF INTEREST: LESSONS LEARNED & RECOMMENDATIONS

A common critique on the MICRC's COI application from Markman, dissenting MICRC commissioners and some members of the public who submitted comments is that city/county lines were broken in pursuit of COIs and/or that certain cities/counties were not considered COIs.

The counterpoint to that sentiment is that the sixth-ranked criteria states, "Districts shall reflect consideration of county, city and township boundaries," which is lower than the third-ranked COI criteria.

The following content represents VNP's contribution to MICRC's Lessons Learned & Recommendations report. The findings and observations are based on VNP interviews with the leaders of 10 COI partner groups across Michigan that both the MICRC and VNP worked closely with during the inaugural redistricting cycle.

According to VNP, COI partners reported multiple challenges during the 2021-22 redistricting process, such as a lack of awareness among their members of the redistricting process in general. In addition, there was confusion as to what would or would not be considered a COI in MICRC's eyes and how MICRC would weigh submissions from a few motivated individuals as compared with large COIs. The COI partners recommended MICRC:

- Publicize and share widely a definition of "community of interest" and clearly and proactively explain how it will weigh different pieces of public input.
- Provide COI examples and counterexamples.
- Prioritize public education and presentations in more populous areas.
- Have adequate financing and staffing for its important public education role.

## Public Comment on Improving the Process

**"Earlier public education before public testimony begins would give more time for communities of interest to understand how they can participate in the process."**

Susan Demeuse, Caledonia

**"I believe I watched every meeting and hearing held by the MICRC, and if there was one takeaway I could offer by way of suggested process improvement, I believe greater clarification surrounding what constitutes a COI as it relates to mapping criteria priorities taken as a whole.**

**"For example, there were obvious tensions with which the commission struggled when it was necessary to weigh issues of partisan fairness against the interests of a COI."**

Karen

# EXHIBIT F

# MEMORANDUM

## To

## Michigan Independent Citizens Redistricting Commission

**From**

**Stephen Markman**
**Michigan Supreme Court Justice (retired)**
**Professor of Constitutional Law, Hillsdale College**

*Commissioned by Hillsdale College*

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# EXECUTIVE SUMMARY

This Memorandum addresses the Report of the Center for Local, State, and Urban Policy at the University of Michigan, offering "Recommendations to the Michigan Independent Citizens Redistricting Commission." The recommendations of the Report are neither in full accord with the language of the Amendment nor with the "common understanding" of the Amendment on the part of the people of Michigan who ratified it.

In particular, the concept of the "community of interest" has been significantly distorted from its previous legal usage. The Report fails to acknowledge what the term historically has meant in Michigan—electoral boundaries built upon counties, cities, and townships, the genuine communities of interest to which all citizens of our state equally belong. In its place, the Report would define the "community of interest" on the basis of groups in support of and in opposition to "public policy issues;" media markets and special assessment tax districts; "shared visions of the future" of communities; and by introducing into the Michigan Constitution for the first time express consideration of "race, ethnicity, and religion." As a result, what the people of Michigan wished to see ended by their ratification of the Amendment—a redistricting process characterized by partisanship, self-dealing, and gerrymandering—risks being reintroduced under a different name.

The Report's reinterpretation of the "communities of interest" concept is predicated upon what its author describes as a "new theory of representation." This "new theory" would replace the citizen as the core of the democratic process with the interest group; it would substitute for the ideal of equal citizenship favored and disfavored voting blocs; it would replace partisanship with ideology; it would enhance the role of "race, ethnicity, and religion" in the construction of electoral districts; and it seeks to build an electoral and political foundation upon the judgments of "experts" rather than those of ordinary citizens.

The new Commission has the opportunity either to separate or to unite—to separate our people as members of interest groups and identity categories or to unite them as equal citizens, entitled to an equal role in the electoral process. Furthermore, the Commission is positioned to influence similar amendments being considered by other states, which are now assessing the Michigan experience. This memorandum presumes that in ratifying the Amendment, the people were doing exactly what was heralded at the time: they were establishing a redistricting process at whose core would be "voters not politicians" and not "reimagining" their democracy or experimenting with "new theories of representation."

# MEMORANDUM

To: Commission Members
From: Stephen Markman
Re: Role of the Commission

## Hillsdale College

Hillsdale College is a private liberal arts college in Hillsdale, Michigan with a student body of approximately 1400. It was founded in 1844 by Free Will Baptist abolitionists and has long maintained a liberal arts curriculum grounded upon the institutions and values of Western culture and Judeo-Christian tradition. Since its inception, Hillsdale has been non-denominational and takes pride in having been the first American college to prohibit discrimination based upon race, religion, or sex in its official charter, becoming an early force in Michigan for the abolition of slavery. A higher percentage of Hillsdale students enlisted during the Civil War than from any other western college. Of its more than 400 students who fought for the Union, four earned the Congressional Medal of Honor, three became generals, many more served as regimental commanders, and sixty students gave their lives. Many notable speakers visited Hillsdale's campus during the Civil War era, including social reformer and abolitionist Frederick Douglass and the man whose remarks preceded those of Abraham Lincoln at Gettysburg, Edward Everett. Hillsdale College plays no partisan role in American politics.

## Purpose

Hillsdale College commissioned retired Justice of the Michigan Supreme Court Stephen Markman to review the Report of the Center for Local, State, and Urban Policy at the University of Michigan ["Report"] issued last August. This Report proposes "Recommendations to the Michigan Independent Citizens Redistricting Commission" ["Commission"] in implementing a state redistricting plan in accordance with the constitutional amendment ["Amendment"] ratified by the people by initiative in 2018. While the Report and its recommendations are thoughtful in many ways, its conclusions and recommendations, in our judgment, are fundamentally mistaken. The purpose of this Memorandum is to highlight the Report's deficiencies and to offer an alternative view that more closely adheres to the principles of American constitutionalism and incorporates more fully the legal and constitutional history of redistricting in Michigan. Specifically, this Memorandum offers thoughts and recommendations in support of what we believe to be the common interest of Michigan citizens that our public institutions uphold principles fundamental to our State constitution: the principles of representative self-government.

## Formative Role

The present thirteen Commissioners comprise the Commission's formative membership and, as a result, your policies and procedures will come to define the work of this new institution. These policies and procedures will continue to define the Commission as new members join it, as new political balances arise in Michigan, and as new public policy controversies and partisan disputes come to the fore. Your legacy of

public service will determine the extent to which the Commission endures as an institution and its reforms become permanent. Each of you has been afforded a rare opportunity to help construct the constitutional course of our state. As with the best of public servants, you must rise to this occasion.

## Absence of Perspective

A threshold concern with the Center for Local, State, and Urban Policy's Report is the absence of historical and constitutional perspective. Of particular concern is the Report's failure to take into adequate consideration in its Recommendations aspects of our federal and state constitutional systems that may be relevant in effectively and responsibly implementing the new Amendment. While the Amendment has removed our state redistricting process from within the traditional purview of the legislative power, it has not removed this process from within the purview of our Constitution. State constitutional principles and values remain applicable to the work of the Commission, including that of judicial review, as do all federal constitutional and legal principles and values. These may include, for example, the guarantee to every state of a "republican form of government;" norms of democratic electoral participation; recognition of our nation as a continuing experiment in self-government; and such fundamental precepts as federalism, equal protection, due process, equal suffrage, checks and balances, and governmental transparency. In other words, the Commission, as with *all* public bodies, does not stand *outside* the "supreme law" of our federal and state constitutions. For that reason, debates and discussions within the Commission that proceed without reference to any value of government larger than how best to define a "community of interest," or that reflect little historical or constitutional perspective, are likely to prove shallow, sterile, and stunted.

## Oath of Office

As Commissioners, you must bear in mind the oath you have each taken, affirming support for the "Constitution of the United States and the Constitution of this state" and vowing to "faithfully discharge the duties of [your] office according to the best of [your] ability." Const 1963, art 11, § 2. While you will exercise your own best judgments in satisfying these obligations, as with all who exercise public authority, you must each familiarize yourself with our federal and state constitutions, just as you have familiarized yourselves with Michigan's redistricting process and the new Amendment.

## Apol Standards

As just one illustration, there is an absence in the UM Report of even a single mention of the "Apol standards" which have guided our state's redistricting process for at least forty years in *name* and for far longer *in practice*. Named after Bernard Apol, a former State Director of Elections, and prepared under the leadership of Michigan Supreme Court Justice Charles Levin, these standards can offer practical guidance to the Commission in understanding and implementing the present Amendment. The Supreme Court has summarized these standards as follows:

1. The Senate consists of 38 districts.

2. The House consists of 110 districts.

3. All districts shall be contiguous, single-member districts.

4. The districts shall have a population not exceeding 108.2% and not less than 91.8% of the ideal district which, based on the 1980 census, would contain 243,739 persons in the Senate and 84,201 persons in the House.

5. The boundaries of the districts shall first be drawn to contain only whole counties to the extent this can be done within the 16.4% range of divergence and to minimize within that range the number of county lines which are broken.

6. If a county line is broken, the fewest cities or townships necessary to reduce the divergence to within 16.4% shall be shifted; between two cities or townships, both of which will bring the district within the range, the city or township with the least population shall be shifted.

7. Between two plans with the same number of county line breaks, the one that shifts the fewest cities and townships statewide shall be selected; if more than one plan shifts the same number of cities and townships statewide, the plan that shifts the fewest people in the aggregate statewide to election districts that break county lines shall be selected.

8. In a county which has more than one senator or representative, the boundaries of the districts shall first be drawn to contain only whole cities and townships to the extent this can be done within the 16.4% range of divergence and to minimize within that range the number of city and township lines that are broken.

9. If a city or township line is broken, there shall be shifted the number of people necessary to achieve population equality between the two election districts affected by the shift, except that, in lieu of absolute equality, the lines may be drawn along the closest street or comparable boundary; between alternate plans, shifting the necessary number of people, the plan which is more compact is to be selected.

10. Between two plans, both of which have the same number of city and township breaks within a particular county, the one that minimizes the population divergence in districts across the county is to be selected.

11. Within a city or township that is apportioned more than one senator or representative, election district lines shall be drawn to achieve the maximum compactness possible within a population range of 98%–102% of absolute equality between districts within that city or township.

12. Compactness shall be determined by circumscribing each district within a circle of minimum radius and measuring the area, not part of the Great Lakes and not part of another state, inside the circle but not inside the district. The plan to be selected is the plan with the least area within all the circles not within the district circumscribed by the circle. *In re Apportionment State Legislature-1992,* 439 Mich 715, 720-22.

Particular attention should be given to standards 5-10, each of which in some manner gives significant regard to counties and municipalities in Michigan's redistricting process. The Apol standards are emphasized because: (a) they offer useful perspective to the Commission that is missing from the Report; (b) the Michigan Supreme Court has observed that these standards are

compatible with the state *constitutional* value of "autonomy of local governmental subdivisions," a value that also goes unmentioned in the Report; and (c) these standards are fair-minded, neutral and non-partisan, and unrelated in any way to the public concerns that led to the present Amendment. Those concerns—partisanship, self-dealing, and gerrymandering—are in no way related to or attributable to the Apol standards.

## The Law

The provision central to the UM Report, as well as to this Memorandum, is Const 1963, art 4, § 6, 13 (c), which states in relevant part,

> Districts shall reflect the state's diverse population and communities of interest. Communities of interest may include, but shall not be limited to, populations that share cultural or historical characteristics or economic interests.

## Communities of Interest

The UM Report makes clear its sense of the importance of the "communities of interest" concept to the implementation of the new Amendment, at least as the Report understands this concept. While recognizing that the concept is "subjective" and "not well-defined," the Report nonetheless proceeds to explain its own very broad understanding of this new political foundation upon which our governmental system allegedly now rests. "Communities of interest" comprise the new "building blocks" of our democracy; "communities of interest" will determine "how well a community is represented;" representatives will be assessed by how responsive they are to the 'community [of interest's] needs;" representatives will be "attentive" to "members [of the "communities of interest"]; "communities of interest" will play a "leading role in the process;" "[t]o be an effective representative, a legislator must represent a district that has reasonable homogeneity of needs and interests;" "'communities of interest' can pick up the texture of bonds and interests within a political jurisdiction;" "'communities of interest' can capture the current patterns of community life;" and "'communities of interest' are "primary elements of the new redistricting process," whose recognition by the Commission "will lead to fairer and more effective representation." Although the term is not well defined in the Amendment (the Amendment largely sets forth examples or illustrations of what "may be included" within the term), the "community of interest" is enthusiastically embraced by the Report as the dominant institution mediating between voters and their elected officials.

## The Citizen (1)

While the Report has much to say concerning "communities of interest," it has little to say concerning the American political system's *genuine* "building block," the citizen. Each citizen participates in the electoral process, not as a component of vaguely defined interest groups accredited by a governmental commission, but by casting his or her vote in accord with individual judgment and personal conscience. Yes, the citizen is a part of a community. But it is not a community arbitrarily cobbled together by a public commission and its "experts" and legitimated only after a majority vote has been cast following months of public hearings and lobbying. And it is not a community to which only *some* citizens belong or a community in which its supposed members may not even have *known* of their affiliation until after the community had been officially endorsed by the Commission. Rather, the citizen belongs

to a *genuine* "community of interest," one to which *all* citizens belong *equally* and in which all share a common interest and influence. And it is one whose definition requires no prolonged hearings or votes or expert consultations. It is *this* "community of interest" that has always served as the foundation of our electoral process, the community to which each of us belongs and is actually *from*, the community that most embodies our status as free and independent citizens, the community we each call *home*.

## The Citizen (2)

To the extent American citizens are defined and officially separated by governmental agencies on the basis of their membership in arbitrarily-defined "communities of interest"—"communities" defined by "interest, identity and affinity" groupings, as the Report proposes—we are stereotyped and divided as a people. If we must be defined in collective terms, it should only be as part of "we the people," in whose name our constitutions were ratified, not compartmentalized in the most fundamental sphere of our citizenship on the basis of considerations such as race, nationality, ethnicity, religion, or skin color. The first obligation of the Commission is to ensure the enactment of a fair-minded, neutral, and non-partisan redistricting process—what would be a remarkable contribution to good government if it could be achieved. It is not an obligation, as the Report instead recommends, to assemble an electoral checkerboard upon which "interest, identity, and affinity" groups can compete for electoral advantage. Such a system would depart drastically from the fundamental principles of the consent of the governed and the equality of all under the law, as it inevitably would elevate some groups of citizens, but not others, to a privileged status.

## Duties of Commission

The Report appears to view the lack of clarity and the obscurity of definition of the "community of interest" concept as presenting an *opportunity*, empowering the Commission, with the assistance of the "philanthropic and non-profit sectors" and the "print and broadcast media," to fill an empty constitutional vessel as the Commission sees fit. Operating in accordance with the Report, the Commission is to be occupied in doing at least the following: (a) examining the qualifications of "interest, identity, and affinity" groups to determine which should be favored in the redistricting process as "communities of interest;" (b) assessing which of the resulting "communities of interest" should be "linked" or not "linked" with other "interest, identity, and affinity" groups, both within and across electoral districts, to establish larger "communities of interest;" and (c) deciding under which circumstances "communities of interest" should be concentrated within a single district in order that the "community" be capable of electing a member of that "community" as its representative, or dispersed among districts in order that the "influence" of that "community" be more broadly felt. Such a process is a zero-sum game in which there are winners *and* losers. The latter will be comprised not only of "interest, identity and affinity" groups rejected as "communities of interest," but also ordinary Michigan citizens, not belonging to any such "community," and who might not have appreciated that such affiliation was a prerequisite for their full exercise of equal suffrage rights in the redistricting process.

## Rule of Law

What is perhaps *most* troubling about this decision-making process imposed upon the

Commission is that it is an essentially standardless process. The rule of law—to which the Commission, as with all public bodies, must adhere—is all about standards: the setting of rules, criteria and procedures that are defined in *advance* of a decision and applied in an equal and consistent manner. Standards lie at the core of public decision-making, for these ensure that the law is applied today as it was yesterday, and as it will be tomorrow. The constitutional guarantees of both due process and equal protection, for example, are heavily dependent upon the government establishing and abiding by standards. As this pertains to "communities of interest"—which the Report describes as our new "building blocks" of democracy—these standards must ultimately be derived from our constitutions and laws, taking into account their language, structure, history, and purpose. In particular, the language of Michigan's constitution must be understood in the "sense most obvious to the common understanding . . . as reasonable minds, the great mass of the people themselves, would give it." *Traverse City Sch Dist v Att'y Gen*, 384 Mich 390, 405 (1971), quoting Thomas Cooley, Constitutional Limitations. In other words, vagueness and unclear language in the Amendment does not warrant the Commission 'making up' the law, acting in an arbitrary fashion, exercising merely personal discretion, or formulating rules and procedures on a case-by-case basis. This is not how the rule of law operates, particularly where the most fundamental institutions of our representative architecture are being constructed.

## "Subjective" & "Not Well-Defined"

What makes the meaning of "communities of interest" in Const 1963, art IV, § 6, 13(c), so challenging is not only the potentially *boundless* implications of the "may include, but are not limited to" language, but also the potential breadth of other critical terms such as "diversity," "cultural," "historical," and "economic." For these reasons, the term "communities of interest" is correctly characterized by the Report as not only being "subjective" and "not well-defined," but as "opaque at best" in a recent article, Liscombe & Rucker, *Redistricting in Michigan*, Mich Bar J, Aug 2020. The Report further summarizes a survey of local officials responding to questions on the meaning and implications of "communities of interest." Significant numbers of these officials responded that "there were no significant local COIs" in their jurisdictions, that the matter was "inapplicable to their jurisdiction," that they "didn't understand what was being asked," or that the new constitutional provision was "not legitimate." In consequence, the Report describes the tenor of these responses as evidencing "uncertainty or skepticism," or, perhaps better put, "uncertainty and utter confusion." Despite this, the Report proceeds to give even the most obscure language of the Amendment meaning, its *own* meaning.

## Compounding the Confusion

Consider, for example, the threshold question of giving proper meaning to the term "community of interest." The definition in the Amendment is already highly confusing, stating merely that the term "may include, but are not limited to" populations that "share cultural or historical characteristics or economic interests." The Report then proceeds to *compound* what is confusing about the Amendment by introducing a host of additional and equally amorphous concepts, including: "racial, ethnic, and religious identities"; "common bonds"; "link[age] to a set of public policy

issues that are affected by legislation"; "shared vision[s] of the future of a community"; "communities concerned about environmental hazards"; "media markets"; "affinity groups among neighboring jurisdictions"; "invisible ["communities of interest"]; "like-minded nearby communities"; "shared identities"; "what binds [the] community together"; "how the community currently engages with the political process"; "particular governmental policies that are high priority"; "nearby areas whose inclusion . . . would strengthen . . . and weaken representation for your community of interest"; and "metrics to transform [the term] 'reflect' into a clear measure of compliance with [the Amendment's redistricting] criteria." All of this occurs with little explanation or analysis, and with no reference whatsoever to Michigan's constitutional history. Of course, such complexity and convolution would be unnecessary if the Report viewed the Commission's work as "merely" redistricting Michigan in a "fair-minded, neutral, and non-partisan" way. But far more is required if the "building block" of our democracy is to be reconfigured in pursuit of a reimagined "theory of representation."

## Reflections on Report

It is not entirely the fault of the Report's authors for promoting an incorrect understanding of "communities of interest" because this term, as used in the Amendment, is defined inadequately and confusingly. Nonetheless, the Report is deeply flawed, and there is a far more reasonable understanding of "communities of interest" that should guide the work of the Commission, not only to render its efforts in better accord with our Constitution, but also to render this work more broadly unifying. The following are several specific observations in this regard:

1. The Report asserts that "communities of interest" must be somehow "linked" to a "public policy issue that [is] affected by legislation." Why must this be so? What if a "community" is simply distinguished by the warmth and neighborliness of its people; by people with a common love for the outdoors and who revel in local recreational opportunities; by people enamored with the peace and quiet of the community; by people who relish the quality of local schools, libraries, shops or restaurants; or by people who simply appreciate its proximity to their place of work or to family members, or its affordability? What, of course, is logically implicit but unstated in the Report's assertion is that there must also be some common point-of-view on the "public policy issue that [is] affected by legislation," lest the "community of interest" join people among whom there is actually an absence of agreement on the "public policy issues." And if there must be a common point-of-view on a "public policy issue that [is] affected by legislation," how is this consideration any different from the partisan considerations that were meant to be precluded by the Amendment in the first place? After all, attitudes toward "public policy issues that [are] affected by legislation" are exactly what characterizes American political parties. They are not fraternities or sororities, social clubs, or charitable societies, but rather groupings of citizens, broadly sharing "common points-of-view" on the role and responsibilities of government, and separated from other groupings of citizens, broadly sharing "contrary points-of-view." Indeed, by the Report's own understanding, the political

party itself might be defined as a "community of interest," except that it was a dominant purpose of the Amendment to reduce partisan influence within the redistricting process, not to heighten it.

2. Furthermore, the Report's "linkage" requirement, apparently encompassing those with common "racial, ethnic, and religious identities," is seemingly in tension with its own definition of "communities of interest." Is the premise of the Report that those possessing common "racial, ethnic, and religious" identities will also tend to possess common attitudes on "public policy issues?" Or is its premise that "communities of interest" should be defined along more narrow, but also more politicized, lines such as, joining together "Asian-American communities favoring globalist and international perspectives," "Hispanic communities with liberal points-of-view," or "Christian communities with socially conservative attitudes?" In either case, the "linkage" requirement is inexplicable in both its rationale and its requirements.

3. The Report enumerates a variety of "geographically-oriented" groupings that "may" give rise to "communities of interest," including those predicated upon common "media markets," "enterprise zones," "special assessment tax districts," and "transportation districts". The Commission should bear in mind that recommendations of this sort are intended to preclude the Commission from treating actual communities—counties, cities, townships, and villages—as "communities of interest." Moreover, are any of the examples set forth by the Report indicative in any way of a bona fide community? Is there a single citizen of Michigan with an allegiance to his or her NBC media market? Or a felt sense of attachment to his or her local "enterprise zone?" Or a kinship with fellow-citizens within his or her "transportation district?" Or a bond with his or her "special assessment tax district?" Are these the types of "building blocks" of a democracy to which a free citizenry would profess their sense of community? If so, what about such "communities of interest" as those based upon sewer districts, subdivisions, apartment complexes, zoning categories, health care centers, tourist areas, policing, firefighting and 911 precincts, downtown development districts, parks and recreational areas, zip-codes, nursing homes, strip malls, and internet protocol addresses? All this to avoid giving consideration to the most genuine of our "communities of interest"—counties, cities and townships, the places where people actually live their lives.

4. The Report specifies shared "racial, ethnic, or religious identities" as potential "communities of interest" in the redistricting process, while excluding without explanation other standard civil rights categories, including nationality, age, alienage, citizenship, gender, sexual preference, and handicap. The Report specifically offers "racial, ethnic, or religious identities" under the "may include" language of the Amendment, rather than under its "diverse population" language, perhaps because it recognizes that Michiganders are "diverse" in many ways that have nothing to do with identity considerations. However, the truly overarching question is one the Report neither asks nor answers: did the people of Michigan who ratified this Amendment

share a "common understanding" that, for the first time in Michigan's history, its Constitution would impose an affirmative obligation upon the state to take "race, ethnicity, and religion" into account in setting public policy even though that dictate, and those terms, nowhere appear in the Amendment? And did these same people also share a "common understanding" that, for the first time in Michigan's history, its Constitution would impose an affirmative obligation upon the state to arrange and configure electoral districts and political influence on the basis of express calculations of "race, ethnicity, and religion?"

5. And in this same regard, what is the relevance of Const 1963, art I, § 2? ("No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin.") Is the redistricting process not a zero-sum process, in which advantages accorded to one "community of interest" on the basis of "race, ethnicity, or religion" come necessarily at the expense of other "communities of interest," and other individuals? Moreover, what is the relevance of Const 1963, art I, § 26, enacted by an earlier constitutional initiative of the people in 2006, in supplying evidence of the people's "common understanding" of the present Amendment? The 2006 provision forbids the state—including expressly the "University of Michigan," the sponsors of the Report in question—from "discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin," in the realms of "public employment, public education, and public contracting." Are these two express constitutional provisions relevant in affording some understanding of what the people meant, and did not mean, in 2018 in ratifying the present Amendment?

6. The Report states that, "communities concerned about environmental hazards" "may" also be designated as "communities of interest." What about communities concerned about the adequacy of policing or firefighting resources; communities concerned about the quality of local education; communities concerned about road infrastructure; or even communities concerned about levels of property taxation resulting from the policies favored by communities concerned about environmental hazards? Does this singular and specific recommendation of the Report, not offered as an illustration but as a formal recommendation, strike the Commissioners as satisfying the standards of "fair-mindedness, neutrality, and non-partisanship," to which the Commission itself is constitutionally obligated?

7. The Report observes that communities with a "shared vision of the future of a community" may also be designated as "communities of interest" (16). Does this really describe an inquiry of the sort that the Commission wishes to undertake, to distinguish between communities with and without a "shared vision" of the future and then to ascertain which specific "shared visions" should be given priority as "communities of interest?" The Commission should reject this invitation to serve as the "Planning Commission for the 21st Century" or as Michigan's

philosopher-kings. Still, let us ask the obvious: what evidence of consensus would conceivably demonstrate a "shared community vision?" How would this be demonstrated in the course of the Commission's hearings? What would define a sufficiently ennobling "vision" to warrant recognition as a "community of interest?" That the schools of the community might some day provide a quality education for every student without regard to race, ethnicity, or religion? That the community might remain peaceable and responsibly policed? That a supportive ethic among neighbors might arise and be sustained? That small businesses might prosper? Perhaps relevant to these inquiries, the Hillsdale College community of more than 6000 people also harbor what it believes to be a shared, and deeply-held, educational and moral vision for the future of the College, and it has adhered to this vision for 175 years. Doubtless, it is a distinctive vision from that of the University of Michigan, but it is no less of a vision and each of our institutions, and our student bodies, are enhanced by these visions. No public body, however capable and enlightened its members might be, should be engaged in comparing and ranking community "visions." The Commission would be acting wisely and responsibly in rejecting this recommendation.

8. Finally, by the sheer breadth and invented character of its recommendations, the Report defines for the Commission a mission that extends well beyond eliminating partisan advantage, ending legislative self-dealing, and curtailing gerrymandering in the redistricting process. For the Commission to succumb to this mission would constitute grievous error and a lost opportunity to bring the people of our state together in the contentious process of redistricting rather than dividing them further. The Commission of thirteen engaged and public-spirited citizens should instead operate faithfully within its charter, act with energy and integrity in pursuit of its constitutional purpose, and define a responsible and lasting legacy for the generations of Commissioners who will follow in the years ahead.

## Analysis: Counties

What follows is an analysis concerning how the Commission should give reasonable and faithful meaning to the concept of "communities of interest" in Const 1963, art 4, § 6, 13 (c). Just as there is no reference in the Report to the Apol standards that have long guided the redistricting process in Michigan, there is also no reference to relevant decisions of the Michigan Supreme Court—the highest tribunal of our state and a court possessing the authority to review the legal determinations of the Commission. Const 1963, art 4, § 6, 18-20. There is an utter absence of historical memory in the Report. In 1982, in the course of reviewing the state's proposed redistricting plan, the Michigan Supreme Court unanimously held,

> We see in the *constitutional* history of this state dominant commitments to . . . single-member districts drawn along boundary lines of local units of government . . . Michigan has a consistent *constitutional history* of combining less populous counties and subdividing populous counties to form election districts. As a result, county lines have remained inviolate. The reason for following county lines was not the "political unit" theory of representation,

> but rather that each Michigan Constitution has required preservation of the *electoral autonomy* of the counties. *In re Apportionment-1982*, 413 Mich 149, 187 (1982) (emphasis added).

And two Justices, Levin and Fitzgerald, in a bipartisan concurrence, separately wrote in this same regard,

> The "*constitutional* requirements" concerning county, city and township lines, which preserve the *autonomy of local government subdivisions* . . . were not part of the political compromise reflected in the weighted land area/population formulae. [Rather,] they are [among] separate requirements which carry forward provisions and concepts which extend back over 100 years from the Constitution of 1850 through the Constitution of 1908 and the 1952 amendment thereto. *In re Apportionment-1982*, 413 Mich 96, 139n24 (1982) (emphasis added).

And the Court unanimously reiterated this same constitutional understanding in assessing Michigan's 1992 redistricting,

> Recognizing the importance of local communities, and the harm that would result from splitting the political influence of these communities, each of [our past] *constitutions* explicitly protected jurisdictional lines . . . For instance, the 1835 constitution said that no county line could be broken in apportioning the Senate. Const. 1835, art. 4, § 6. The 1850 constitution repeated that rule and added that no city or township could be divided in forming a representative's district. Const. 1850, art. 4, §§ 2-3. [And as] originally enacted, the 1908 constitution continued those rules, though it permitted municipalities to be broken where they crossed county lines. Const. 1908, art. 5, §§ 2-3. *In re Apportionment-1992*, 486 Mich 715, 716, 716 n 6 (1992).

Although without the slightest doubt, our Constitution can be changed or altered by amendment, as it has been here, a responsible assessment of new constitutional language would take into account the interpretive counsel that might be derived from past constitutional provisions and court decisions. And in that regard, what the above decisions indicate is that, *at least* through 2018, "preservation of the electoral autonomy of the counties" was viewed by the highest court of this state as a substantial *constitutional* value, and reflected in our state's redistricting processes in 1982 and 1992 (and since) by the application of the Apol standards upholding where reasonably possible the integrity of county and municipal boundaries. Moreover, in assessing the "common understanding" of the people who ratified the Amendment in 2018, and in reviewing the language of the Amendment itself, we see no evidence that this constitutional value has been repudiated.

## Analysis: Judicial Use of "Communities of Interest"

The Report incorrectly states that the concept of "communities of interest" is an entirely "new" concept in Michigan law. It is not. For example, in the course of a unanimous decision of the Michigan Supreme Court addressing the 1982 redistricting process, the following observations were made in a full concurrence to that decision by Justices Levin and Fitzgerald,

> The Court considered whether, when cities or townships must be shifted, there should be shifted (i) the number of cities or townships necessary to equalize the population of the two districts, or (ii) only the number of cities or townships necessary to bring the districts within the range of allowable divergence. The Court concluded that the concept of minimizing the breaking of county lines extended to the shifting of cities and townships. A county is kept more intact as a *community of interest*, and fewer special election districts must be created, when the minimum necessary number of cities or townships are shifted. *In re Apportionment of State Legislature*- 1982, 413 Mich 149, 155n 8 (1982).
>
> * * *
>
> There remained the possibility that two sets of cities or townships might satisfy the above rule; for example, each of two townships might contain the population required to be shifted. The Court again concluded that the concept of preserving counties as *communities of interest* to the fullest extent possible required that the township or set of townships with the fewest people necessary should be shifted. *In re Apportionment of State Legislature*- 1982, 413 Mich 149, 155n 8 (1982).
>
> * * *
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> The flaw in this method [of redistricting] is that it artificially divides the counties into two groups, treating one group differently than another . . . The historical [redistricting] practice of following county lines never rose to a level of a principle of justice, [but] it has always been simply a device for controlling gerrymandering, facilitating elections and preserving *communities of interest*. Once the rule of following county boundary lines yielded to the principle of 'entitlement', the Court could not pretend to have a neutral and objective set of guidelines. *In re Apportionment of State Legislature*- 1982, 413 Mich 149, 193-5 (1982).

Each of these judicial excerpts employs "communities of interest" in a context referring to municipal boundaries and each was specifically made in the course of assessing the 'Apol standards,' with its emphasis upon preserving such boundaries wherever reasonably possible. The Supreme Court in the 1992 redistricting process again addressed the term and similarly observed,

> The Masters determined that none of the plans submitted to them was satisfactory. They stated that these plans 'either fail to comply with the 1982 [Apol] criteria or do so only facially.' Further, the plans exhibited 'a disregard of some specific criteria, such as *community of interest*. . . . Thus the Masters drew their own plan. In doing so, they followed the same criteria used by Mr. Apol in 1982 *In re Apportionment of State Legislature*-1992, 437 Mich 715, 724 (1992).
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> * * *
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> A legislator [can represent his constituents] only if there is some real *community of interest* among the represented group — without that, the legislator cannot speak effectively on the group's behalf. When a small portion of a jurisdiction is split from the remaining body and affixed to another governmental entity in order to reduce population divergence, the shifted area is likely to lose a great portion of its political

> influence. For that compelling reason, grounded in sound public policy, all four Michigan Constitutions have provided that jurisdictional lines, particularly county lines, are to be honored in the apportionment process. Id. at 732-33.
>
> * * *
>
> Nor did the parties' proofs sufficiently demonstrate
> a *community of interest* between and among the voter populations of Oakland County and the voter populations of the City of Detroit and Wayne County. Id. at 737 n 50.

There is, of course, additional language within Const 1963, art IV, § 6, 13(c), that must also be taken into consideration in giving meaning to "communities of interest" in the new Amendment. By these excerpts, however, it is clear that the slate is not quite as blank concerning the meaning of "communities of interest" as the Report would suggest. Especially in the context of an Amendment focused upon redistricting, and in which the critical term has been asserted by the Report to be "new," it might be thought that clarifying language from Michigan's highest court in the *two most significant redistricting decisions of the past half-century* would be welcomed and closely considered. And it is clear that the term has specifically been understood to refer to municipal communities and their boundaries.

## Analysis: § 13(c)

Next, with regard to the language of the Amendment itself, the first sentence of § 13(c) specifies that the *only* entities that "shall" or "must" be reflected within an electoral district are "communities of interest," and the "state's diverse population." However, the second sentence of § 13(c) does not set forth anything that "shall" or "must" be designated as a "community of interest" and thus, by cross reference, also does not set forth anything within the first sentence that "shall" or "must" be reflected within an electoral district. Instead, the second sentence communicates only that certain groups "may" be included as a "community of interest" and that a "community of interest" is not "limited to" such groups. It defines nothing that "shall" or "must" be treated as such a community. As a result, when viewed together, the operative language of the Amendment, the first sentence of § 13(c), provides only that communities of interest "shall" be reflected in the redistricting process but only *if* they have been designated in the first place. The problem in focusing upon § 13(c), without also assessing § 13 as a *whole*, is that there may be *no* designated "communities of interest" that "shall" or "must" be reflected within electoral districts, despite an obvious intention that there be such communities.

## Analysis: § 13(f)

While the conundrum posed in the previous paragraph—that there may be *no* "community of interest" at all to be considered in the redistricting process—reflects one *conceivable* understanding of § 13(c), it is not the most *reasonable* understanding. Rather, a more reasonable understanding of § 13(c), would be to read § 13 as a whole, and to include as "communities of interest" *precisely* the entities described in § 13(f): the "counties, cities, and townships," whose boundaries "*shall*" be reflected in the redistricting process. Indeed, these are the *only* entities in the Amendment whose relevance in the redistricting process is made constitutionally *mandatory* and not merely a product of the Commission's *discretion,* thus avoiding any possibility that the consideration of

"communities of interest" in the process is rendered a nullity by the absence of any "community of interest" being *designated* pursuant to the second sentence of § 13(c). This understanding is made even more compelling by the fact that such "counties, cities, and townships" are reasonably understood as the *actual* "communities of interest" referred to in the first sentence of § 13(c). As result, an understanding of § 13 that harmonizes its subsections (c) and (f), which is the obligation of any interpreter of a provision of law, not only offers a more reasonable understanding of § 13(c) by filling in its gaps, but it is an understanding in closest accord with the genuine meaning of the term "community of interest" in Michigan redistricting law and history.

**Analysis: Priorities**

The Report not only fails to harmonize § 13(c) and § 13(f), but seeks to "deprioritize" the latter provision (requiring the consideration of "counties, cities, and townships") on the grounds of its relative "order of priority within § 13." While such an "order of priority" makes sense in defining the organization or sequence of the process by which electoral districts are to be constructed, it runs the risk—one the Report seems content to run—that such an "order of priority" will effectively read out of the Constitution, or nullify, express constitutional provisions, in this instance, § 13(f) and its *exclusive* requirement that "counties, cities, and townships" "*shall*" be considered in the redistricting process. To understand this concern, we must again review decisions of the Michigan Supreme Court:

> [The challenged law in issue] provides for the establishment of a county apportionment commission and that such a commission "shall be governed by the following guidelines in the stated order of importance: "The stated order is: (a) equality of population as nearly as is practicable; (b) contiguity; (c) compact and as nearly square in shape as is practicable; (d, e, f) not joining townships with cities and not dividing townships, villages, cities or precincts unless necessary to meet the population standard; (g) not counting residents of state institutions who cannot vote; and (h) that the district lines not be drawn to effect partisan political advantage.
>
> If the stated order requires exhaustive compliance with each criterion before turning to a succeeding criterion, then criteria (a) through (c) alone would be determinative and criteria (d) through (f) could not be given any effect.
>
> There are an endless number of ways in which one could construct the district lines consistent with criterion (a), equality of population, and criterion (b), contiguity. Criterion (c) requires that all districts shall be as compact and as nearly square in shape as is practicable, depending on the geography of the county area involved. Read literally and given an absolute priority, that criterion would require that the district lines be drawn *without regard* to township, village, city or precinct lines. The apportionment of a county would [then] be a mechanical task.
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> * * *
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> We reject such a rigid reading of "stated order" because so read:
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> * * *

> (c) It would give no effect whatsoever to criteria (d) through (f) concerning the preservation of township, city, village and precinct lines, and thereby make meaningless those provisions. It is our duty to read the statute as a whole and to avoid a construction which renders meaningless provisions that clearly were to have effect. *Appeal of Apportionment of Wayne County-1982*, 413 Mich 224, 258-59 (1982); see also *In re Apportionment of State Legislature*-1992, 439 Mich 715, 742n 65 (1992).

In sum, the UM Report seeks, first, to exclude "counties, cities, and townships" from within the purview of the "community of interest"; second, to elevate the role of its own preferred "communities of interest" by giving emphasis to the "may include, but are not limited to" language of the Amendment; and, third, to "deprioritize" and thereby "preempt" from any material role in the redistricting process "counties, cities, and townships." None of these approaches—by concocting creative and dubious "communities of interest" one the one hand, and by excluding the most obvious and historically-grounded "communities of interest" on the other—constitute a fair or reasonable way of understanding the Amendment.

## Analysis: Home

"Counties, cities, and townships" are not only reasonably understood as our fundamental "communities of interest" on the basis of judicial decisions and historical practice, as well as a close analysis of the Amendment itself, but also in terms of how the ordinary citizen would understand this concept. Such communities are where the people reside; where they sleep, play, relax, worship, and mix with families, friends and neighbors; where their children attend schools, make and play with friends, compete in sports, participate in extracurricular activities, and grow to maturity; where they work, shop, dine, and participate in acts of charity; where their taxes are paid, votes cast, and library books borrowed; and where their police and firefighters serve and protect. In short, these places are meaningful to every Michigander, for they serve to define what we call "home" and they signify to the rest of the world where we are "from." Nonetheless, with no explanation or analysis, the Report summarily and confidently assures the Commission that a "community of interest is not a political jurisdiction."

## Analysis: Fairness

The Report defines "communities of interest" on the basis of "race, ethnicity, and religion;" "media markets;" "environmental hazards;" "creative arts;" "shared visions of the future;" "immigrant communities;" and "linkages to a set of public policy issues that are affected by legislation"—*none* of which is found anywhere within the law, except that each fits, as would *any other* conceivable entity, within the "may include, but are not limited to" language of § 13(c). Yet, the most obvious and genuine "communities of interest"—the "counties, cities, and townships" of Michigan, the *only* entitles that *"shall"* be given consideration in the redistricting process under the Amendment—are to be *excluded* from the term. This is done without the slightest consideration for what may be the *greatest* strength of treating our "counties, cities, townships" as "communities of interests"—namely, that every Michigan citizen is an equal part of *this* "community of interest" and there is no other "community of interest" whose establishment would be more "fair-minded, neutral, and non-partisan." That is, the definition proposed here—"communities of

interest" based upon "communities" of "interest"—has at least the minor virtue of enabling the Commission to avoid struggling with the impossible, and inapt, question, "which citizens should count, and which should count more and which should count less?"

## Analysis: Gerrymandering

The Amendment was popularly headlined as an "anti-gerrymandering" measure in such media as the *Detroit Free Press* (November 7, 2018). Yet the Report, in its disdain for municipal "communities of interest", and in its preference for the dislocated and erratic boundaries of interest and identity groups, is far more likely to give rise to districts that are truly gerrymandered, albeit in different ways than they may sometimes have been gerrymandered in the past. Relying upon county, city, and township lines is simply the most certain and fair-minded way of avoiding gerrymandering altogether, for there is no more neutral and established boundary, with almost all of these having been created either pre-statehood (as with Wayne County in 1796) or shortly thereafter. District maps produced in accordance with the Report will not only appear oddly-shaped and irregular, but they will appear to be so precisely because they will have been constructed in pursuit of traditional gerrymandering considerations, dividing our citizens into winners and losers.

## Analysis: "A New Theory of Representation"

In a press release from the University of Michigan, the author of the Report has stated that the Report's recommendations offer a "new theory of representation." (closup.umich.edu/policy-reports/18/the-role-of-communities-of-interest-in-michigans-new-approach-to-redistricting-recommendations, Aug 31, 2020.) While its theory is indeed new to the history of American constitutionalism, it is foreign to it as well. It is a "new theory" that replaces the citizen with the interest group as the core of the democratic process; a "new theory" that enhances the role of race, ethnicity, and religion in the construction of electoral districts; a "new theory" that substitutes for the ideal of equal citizenship that of favored and disfavored voting blocs; a "new theory" that replaces partisanship with ideology; a "new theory" that seeks to build a new political foundation upon the judgments of 'experts' rather than those of ordinary citizens. Although the author's assertion that his Report's recommendations are "unique and interesting" may be also correct, these do not have much to do with the intentions of several million citizens who cast their votes for Proposition 2.

## Analysis: Summary

In summary, regarding the threshold policy question that must be addressed by the Commission—the meaning of the "community of interest"—the Report essentially asserts that almost any entity, any asserted "community," can be included within the "may include, but are not limited to" language of § 13(c) and thus be considered as a "community of interest," with the singular and remarkable *exception* of the most genuine of these communities, our "counties, cities, and townships." These are to be excluded, despite the fact:

- That "counties, cities, and townships" are by any reasonable and ordinary definition of the term *actual* "communities of interest;"

- That "communities of interests" has been defined in Michigan Supreme Court decisions to refer principally to "counties, cities, and townships;"

- That such Michigan Supreme Court decisions have pertained specifically and directly to the state's redistricting process;

- That "communities of interest," understood in the context of the 'Apol standards,' which have guided Michigan redistricting since at least 1982, have also been understood in terms of "counties, cities, and townships; "

- That "counties, cities, and townships" are the only entities that "shall" be reflected in the redistricting process and there is no alternative definition in the Amendment of what "shall" be considered a 'community of interest;"

- That "counties, cities, and townships," as with every other entity the Report would include within "communities of interests" on the basis of the "may include, but are not limited to" language of § 13(c), obviously could also be included on this same basis;

- That "counties, cities, and townships" would seem to be the most obvious "communities" for inclusion within the Amendment's undefined and discretionary "community of interest" categories of "shared cultural characteristics," "shared historical characteristics," and "shared economic interests;" and

- That the most reasonable and harmonized understanding of § 13 of the Amendment strongly suggests that the "counties, cities and townships" referred to in § 13(f) are precisely the "communities of interests" referenced in the first sentence of § 13(c).

## Authority of the People

In response to this Memorandum, the authors of the Report may contend that the people of Michigan through their constitutional amendment process are entitled to repudiate the Apol standards, the decisions of the Michigan Supreme Court, and historical redistricting practices. This Memorandum would not dispute such an assertion, only that this is not what the people have, *done* by the present Amendment. While the law of Michigan has been modified in important regards—most significantly, by conferring the authority to administer the redistricting process upon the Commission instead of the Legislature—what the people have *not* done is enact *obligatory* changes in what is meant by the "community of interest." While the term has been made subject to change at the *discretion* of the Commission, the standards, decisions, and practices addressed in this Memorandum largely pertain to the *mandatory* obligations of the Commission in giving meaning to the "community of interest." ("Districts *shall* reflect consideration of county, city, and township boundaries.") In other words, while the Commission may possess the *discretion* to redefine the "community of interest," it also possesses the *obligation* to consider geographic "communities of interest. The Commission should act to carry out its *obligations* under the Amendment while at the same time exercising its *discretion* not to act *beyond* those obligations in designating "communities of interest." This would constitute the wisest and most responsible exercise of authority by the Commission and nothing in the debate over Proposition 2 or in

the assessment of the people's "common understanding" or in the language of the Amendment compels any different result.

## Conclusion

Districts should be drawn according to the proposition that each voter should be rendered as equal as possible in his or her participation and influence in the democratic process and as individual citizens, rather than as members of interest groups, and that districts should be drawn with a view to uniting rather than dividing society. The guiding ideal should be that the purpose of government is to secure the rights of individual citizens, their common good, and the strengthening of the right of all of our people to pursue happiness under our federal and state constitutions. The best way for the Commission to accomplish this is to rely upon the longstanding definition of "communities of interest" as being primarily "counties, cities, and townships."

# COMMISSIONER RECOMMENDATIONS

Respectfully, the Independent Citizens Redistricting Commission should consider the following recommendations in carrying out its responsibilities under the Amendment:

1. The Commissioners should seek in their decisions to act in a fair-minded, neutral, and non-partisan manner, in accordance with their responsibilities under the Constitution and in accordance with "common understandings" of the Amendment by the people of our state.

2. The Commissioners should work to secure an understanding and perspective, not only of the Amendment and our state's redistricting process, but of the principles and values underlying our two constitutions. You should be guided in this process by your own best judgments as independent citizens and by the legal framework to which "we the people" have assented, not by the judgments of unelected 'experts.'

3. The Commissioners should take care in the redistricting process to maintain and preserve the greatest institution of our people, representative self-government under constitutional rules and principles.

4. The Commissioners should bear in mind that as formative members of the Commission, your decisions and judgments will continue to guide the Commission in the years ahead as partisan majorities, political incumbents, and legislative debates ebb and flow. Your legacy will far outlast your public service, and so requires wisdom and foresight.

5. The Commissioners should show modesty in carrying out their mission. What the people of Michigan understand most clearly of your work is that you have replaced the Legislature in the decennial process of reconstructing our electoral districts. Do not succumb to the invitations of "experts" to broaden what is already a substantial and daunting mission. As with all responsible public servants, you must act within your authority and not within your power.

6. The Commissioners should show humility in recognizing that, however capable and committed each of you might be, you are nonetheless in the unusual position of exercising crucial public responsibilities without ever having been elected or confirmed to your position by a democratic vote of those whom you now represent.

7. The Commissioners should avoid becoming enmeshed or embedded within factions or coalitions on the Commission. You are a single Commission representing a single people.

8. The Commissioners should act as nonpartisans, not bipartisan. Although the presence of independent members of the Commission is one important means of achieving a nonpartisan process, so too are members of the Commission with partisan backgrounds who respect that their constitutional obligation is to avoid a "disproportionate advantage to a political party." Each of you thus constitutes your own personal "check and balance" upon the Commission to ensure that it acts in the necessary manner.

9. The Commissioners must subordinate their individual attitudes and allegiances to the requirements of the law. As with all public officers, your personal codes and consciences must conform to the rule of law.

10. The Commissioners should maintain their independence from political parties, incumbents, blocs, experts, interest groups, aspirant 'communities of interest,' and even from one another, but you cannot be independent of the people or their laws and constitutions.

11. The Commissioners should not seek or accept outside funding, or enter into partnerships, or engage in outreach with businesses, foundations, philanthropic organizations, non-profits, or educational institutions, as has been urged upon you. Yours is an *independent citizens* commission, and the only reason these actions would be necessary would be if you were to expand upon your mission. Do not leave as your legacy one more expensive governmental bureaucracy and carefully consider how dispiriting it would be to the people of this state if *this* Commission was to abuse its power and position.

## REDISTRICTING RECOMMENDATIONS

1. Consider carefully the Apol standards and its variations. Do not assume that these standards were repudiated in 2018 or that they contributed in any way to partisanship, legislative self-interest and self-dealing, or gerrymandering in the redistricting process. Do not close yourself to learning from past practice and historical experience. Although with exceptions, the history of Michigan has, by and large, been one of honest and responsible government.

2. Consider defining "communities of interest" exclusively on the basis of fair-minded, neutral, and non-partisan applications of "county, city, and township" boundaries. Every Michigan citizen is equally a member of such "communities of interest." Once you begin to exercise increasingly broad discretion in defining and creating new "communities of interests," you will inevitably begin to pit citizens and interests against each other. Resolving these disputes will inevitably place yourselves and the Commission into the type of political process the Commission was meant to transcend.

3. Consider carefully whether you wish to introduce explicit considerations of "race, ethnicity, and religion" into the redistricting process. Not only will such considerations come at the expense of other "races, ethnicities, and religions," but such policies implicate our nation's most profound and divisive issues. To paraphrase former U.S. Supreme Court Justice William O. Douglas, "When such lines are drawn by the State, the diverse communities that our Constitution seeks to weld together become separated, and antagonisms are generated that relate to 'race, ethnicity, and religion,' rather than to political issues." A unifying legacy on the part of the Commission would be a momentous legacy.

4. Consider *not* exercising the Commission's apparently limitless discretion to create new "communities of interests" under its "may include, but are not limited to" authority in § 13(c). This is truly the broadest-possible and most standardless delegation of power ever placed into our Constitution. The language does not reflect well upon the rule of law; do not let it also reflect poorly upon the Commission.

5. Consider carefully the wide variety of means, direct and indirect, obvious and subtle, by which legislators and political strategists have sometimes placed partisan and 'self-interested' thumbs on the scales of redistricting justice. For Members of the Commission to do the same would be no step forward in the pursuit of good government. Avoid doing acts of partisanship, as well as acts that are *tantamount* or *equivalent* to partisanship.

6. Consider carefully the regularity of shape of the districts you construct. "Gerrymanders" are not simply oddly shaped districts, but encompass also districts of a more regular character, but with erratic and 'squiggly' indentations and protrusions undertaken largely to achieve political or partisan purposes.

7. Consider carefully before you add to the complexity of the redistricting process by the adoption of new legal concepts, new statistical measurements, novel types of "communities of interests," amorphous political science terms, new 'metrics,' and pseudo-scientific concepts of redistricting. None of this complexity and convolution will be necessary if the Commission views its responsibilities simply as the preparation of a "fair-minded, neutral, and non-partisan" redistricting plan, rather than as "reimagining" representative government for Michigan.

8. Consider carefully the risk of nullifying or distorting express provisions of the Amendment, and thereby rewriting the Amendment, by an overly rigid application of the "order" of provisions, by reviewing Michigan Supreme Court decisions in this regard. See "Analysis: Priorities."

9. Consider carefully whether the phrases and concepts you will hear from the 'experts,' such as "common bonds," "affinities," "shared characteristics, "communities," "identities," and "like-mindedness" are largely employed to divide and separate people, rather than to join them together and unify.

10. Consider carefully whether "communities," "identities" "interests," "groups," or "populations" are more strengthened in the political process where their members are consolidated within districts or dispersed among districts. Then, consider carefully whether endless calculations of this sort are part of the proper and "common understanding" of the Commission's work by the people of Michigan who ratified the Amendment.

♦ This Memorandum was commissioned by Hillsdale College and authored by Stephen Markman, a retired Justice of the Michigan Supreme Court and a Professor of Constitutional Law at the College for 28 years.

# EXHIBIT G

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The Office of

# Secretary of State Jocelyn Benson

SOS / Elections

# Michigan Committee Statement Summary Page

- **Committee Name:** MALLORY MCMORROW FOR MICHIGAN
- **Statement Type:** POST-PRIMARY CS
- **Statement Year:** 2022

« Back to statement details

| | | This Period | | Cumulative This Election Cycle |
|---|---|---|---|---|
| **RECEIPTS** | | | | |
| 3. Contributions | | | | |
| a. Itemized Contributions | (3a.) | $13,442.99 | | |
| b. Unitemized | (3b.) | $0.00 | | |
| c. Subtotal of Contributions | (3c.) | $13,442.99 | (18.) | $662,358.26 |
| 4. Other Receipts | (4.) | $0.00 | (19.) | $330.95 |
| **5. Total Contributions and Other Receipts** | (5.) | $13,442.99 | (19.) | $662,689.21 |

| | | This Period | | Cumulative This Election Cycle |
|---|---|---|---|---|
| **IN-KIND CONTRIBUTIONS AND EXPENDITURES** | | | | |
| 6. In-Kind Contributions | (6.) | $0.00 | (21.) | $910.15 |
| 7. In-Kind Expenditures | (7.) | $0.00 | (22.) | $0.00 |
| **EXPENDITURES** | | | | |
| 8. Expenditures | | | | |
| a. Itemized | (8a.) | $58,260.39 | | |
| b. Itemized GOTV | (8b.) | $0.00 | | |
| c. Unitemized | (8c.) | $0.00 | | |
| **9. Total Expenditures** | (9.) | $58,260.39 | (23.) | $394,805.64 |
| **INCIDENTAL EXPENSE DISBURSEMENTS** | | | | |
| 10. Disbursements | | | | |
| a. Itemized | (10a.) | $0.00 | | |
| b. Unitemized | (10b.) | $0.00 | | |
| **11. Total Incidental Expenditure Disbursements** | (11.) | $0.00 | (24.) | $225.00 |
| **DEBTS AND OBLIGATIONS** | | | | |
| 12. Debts and Obligations | | | | |
| a. Owed by the Committee | (12a.) | $0.00 | | |

| | | This Period | Cumulative This Election Cycle |
|---|---|---|---|
| b. Owed to the Committee | (12b.) | $0.00 | |
| **BALANCE STATEMENT** | | | |
| 13. Ending Balance of last report filed | (13.) | $356,186.63 | |
| 14. Amount received during reporting period | (14.) | $13,442.99 | |
| 15. Subtotal | (15.) | $369,629.62 | |
| 16. Amount Expended during reporting period | (16.) | $58,260.39 | |
| **17. ENDING BALANCE** | (17.) | **$311,369.23** | |

# EXHIBIT H

Michigan.gov

The Office of

# Secretary of State Jocelyn Benson

SOS / Elections

# Michigan Committee Statement Summary Page

- **Committee Name:** MALLORY MCMORROW FOR MICHIGAN
- **Statement Type:** ANNUAL CS
- **Statement Year:** 2022

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| | | This Period | | Cumulative This Election Cycle |
|---|---|---|---|---|
| **RECEIPTS** | | | | |
| 3. Contributions | | | | |
| a. Itemized Contributions | (3a.) | $44,696.94 | | |
| b. Unitemized | (3b.) | $0.00 | | |
| c. Subtotal of Contributions | (3c.) | $44,696.94 | (18.) | $185,606.45 |
| 4. Other Receipts | (4.) | $0.00 | (19.) | $330.95 |
| **5. Total Contributions and Other Receipts** | (5.) | $44,696.94 | (19.) | $185,937.40 |

| | | This Period | | Cumulative This Election Cycle |
|---|---|---|---|---|
| **IN-KIND CONTRIBUTIONS AND EXPENDITURES** | | | | |
| 6. In-Kind Contributions | (6.) | $663.04 | (21.) | $910.15 |
| 7. In-Kind Expenditures | (7.) | $0.00 | (22.) | $0.00 |
| **EXPENDITURES** | | | | |
| 8. Expenditures | | | | |
| a. Itemized | (8a.) | $10,310.93 | | |
| b. Itemized GOTV | (8b.) | $0.00 | | |
| c. Unitemized | (8c.) | $0.00 | | |
| **9. Total Expenditures** | (9.) | $10,310.93 | (23.) | $124,818.75 |
| **INCIDENTAL EXPENSE DISBURSEMENTS** | | | | |
| 10. Disbursements | | | | |
| a. Itemized | (10a.) | $0.00 | | |
| b. Unitemized | (10b.) | $0.00 | | |
| **11. Total Incidental Expenditure Disbursements** | (11.) | $0.00 | (24.) | $225.00 |
| **DEBTS AND OBLIGATIONS** | | | | |
| 12. Debts and Obligations | | | | |
| a. Owed by the Committee | (12a.) | $0.00 | | |

| | | This Period | Cumulative This Election Cycle |
|---|---|---|---|
| b. Owed to the Committee | (12b.) | $0.00 | |
| **BALANCE STATEMENT** | | | |
| 13. Ending Balance of last report filed | (13.) | $70,218.30 | |
| 14. Amount received during reporting period | (14.) | $44,696.94 | |
| 15. Subtotal | (15.) | $114,915.24 | |
| 16. Amount Expended during reporting period | (16.) | $10,310.93 | |
| **17. ENDING BALANCE** | (17.) | **$104,604.31** | |

# EXHIBIT I

Michigan.gov

The Office of

# Secretary of State Jocelyn Benson

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# Michigan Committee Statement Contributions

- **Committee Name:** MALLORY MCMORROW FOR MICHIGAN
- **Statement Type:** PRE-PRIMARY CS
- **Statement Year:** 2022
- **Schedule:** ITEMIZED DIRECT CONTRIBUTIONS

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**Matches** 9451 - 9451 of 9451

« **Previous 50 matches**

**Result #9451**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**

*CYRUS NAHEEDY*
500 SNYDER AVE

**City State Zip**
ANN ARBOR
MI 48103-5553

**Date**
02/21/2022

**Amount**
$1.00

**Cummul**
$16.00

**Matches** 9451 - 9451 of 9451

« **Previous 50 matches**

Michigan.gov

The Office of

# Secretary of State Jocelyn Benson

SOS / Elections

# Michigan Committee Statement Contributions

- **Committee Name:** MALLORY MCMORROW FOR MICHIGAN
- **Statement Type:** POST-PRIMARY CS
- **Statement Year:** 2022
- **Schedule:** ITEMIZED DIRECT CONTRIBUTIONS

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**Matches** 251 - 296 of 296

**« Previous 50 matches**

| Result #251 |
| --- |
| **Receiving Committee**<br>MALLORY MCMORROW FOR MICHIGAN |
| **Committee ID-Type**<br>518210 – CAN |
| **Schedule Type**<br>DIRECT |
| **Description** |
| **Received From** |

*CHRIS OMEARA DIETRICH*
PO BOX 1379

**City State Zip**

CAMPBELL
CA 95009-1379

**Date**

07/20/2022

**Amount**

$5.00

**Cummul**

$20.00

**Result #252**

**Receiving Committee**

MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**

518210 – CAN

**Schedule Type**

DIRECT

**Description**

**Received From**

*ED MOEHAGEN*
10 BRIDGEWATER AVE

**City State Zip**

CHIPPEWA FALLS
WI 54729-1305

**Date**

07/20/2022

**Amount**

$5.00

**Cummul**

$20.00

## Result #253

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*ED MOEHAGEN*
10 BRIDGEWATER AVE

**City State Zip**
CHIPPEWA FALLS
WI 54729-1305

**Date**
08/20/2022

**Amount**
$5.00

**Cummul**
$25.00

## Result #254

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**

*MAXINE MONDSHINE*
30685 WOODGATE DR

**City State Zip**
SOUTHFIELD
MI 48076-5387

**Date**
07/24/2022

**Amount**
$5.00

**Cummul**
$70.00

**Result #255**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*HARSHAD SHAH*
4866 MENDOTA ST

**City State Zip**
UNION CITY
CA 94587-5554

**Date**
08/10/2022

**Amount**
$5.00

**Cummul**
$30.00

**Result #256**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*ROB LEATHERWOOD*
1800 POST RD APT 1215

**City State Zip**
SAN MARCOS
TX 78666-3845

**Date**
07/20/2022

**Amount**
$5.00

**Cummul**
$20.00

**Result #257**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**

*JOSEPH RUTTER*
310 W 3RD AVE

**City State Zip**
COLUMBUS
OH 43201-3316

**Date**
08/19/2022

**Amount**
$5.00

**Cummul**
$25.00

**Result #258**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*PATRICIA O'BOYLE*
26871 SPIRAL RD

**City State Zip**
RICHLAND CENTER
WI 53581-4404

**Date**
07/22/2022

**Amount**
$5.00

**Cummul**
$20.00

**Result #259**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*CHIA YUAN HUNG*
279 PROSPECT AVE APT 2D

**City State Zip**
BROOKLYN
NY 11215-8425

**Date**
07/20/2022

**Amount**
$5.00

**Cummul**
$20.00

**Result #260**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**

*DAVID ARMER*
379 CASTLE ST

**City State Zip**
GENEVA
NY 14456-1509

**Date**
08/20/2022

**Amount**
$5.00

**Cummul**
$25.00

**Result #261**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*CHRIS OMEARA DIETRICH*
PO BOX 1379

**City State Zip**
CAMPBELL
CA 95009-1379

**Date**
08/20/2022

**Amount**
$5.00

**Cummul**
$25.00

**Result #262**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*IRINA KOGEL*
405 N MAIN ST

**City State Zip**
DAVIDSON
NC 28036-9405

**Date**
07/19/2022

**Amount**
$5.00

**Cummul**
$20.00

**Result #263**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**

*IRINA KOGEL*
405 N MAIN ST

**City State Zip**
DAVIDSON
NC 28036-9405

**Date**
08/19/2022

**Amount**
$5.00

**Cummul**
$25.00

**Result #264**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*KEVIN RAINES*
934 PLUM ST APT 6

**City State Zip**
WENATCHEE
WA 98801-2792

**Date**
07/25/2022

**Amount**
$5.00

**Cummul**
$20.00

**Result #265**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*ROB LEATHERWOOD*
1800 POST RD APT 1215

**City State Zip**
SAN MARCOS
TX 78666-3845

**Date**
08/20/2022

**Amount**
$5.00

**Cummul**
$25.00

**Result #266**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**

*VICTORIA WALDRON*
9525 CRUMPS MILL RD

**City State Zip**
QUINTON
VA 23141-2619

**Date**
08/21/2022

**Amount**
$5.00

**Cummul**
$25.00

**Result #267**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*LISA WASCHKA*
1409 MEDFORD DR

**City State Zip**
BEDFORD
TX 76021-2457

**Date**
08/06/2022

**Amount**
$5.00

**Cummul**
$30.00

**Result #268**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*KATHY MCGLYNN*
2301 SUNNYSIDE AVE

**City State Zip**
LANSING
MI 48910-3576

**Date**
08/20/2022

**Amount**
$5.00

**Cummul**
$25.00

**Result #269**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**

*CHERYL HARRIS*
1660 N MOON SHADOW RD

**City State Zip**
CHINO VALLEY
AZ 86323-4551

**Date**
07/19/2022

**Amount**
$5.00

**Cummul**
$40.00

**Result #270**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*LESLIE BAEHRE*
1678 PEPPER RIDGE DR

**City State Zip**
HASLETT
MI 48840-8216

**Date**
07/20/2022

**Amount**
$5.00

**Cummul**
$20.00

**Result #271**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*SARAH MOZAL*
1744 N WILTON PL

**City State Zip**
LOS ANGELES
CA 90028-5709

**Date**
08/19/2022

**Amount**
$5.00

**Cummul**
$25.00

**Result #272**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**

*JOE ROMO*
149 WHITNEY AVE

**City State Zip**
MANCHESTER
NH 03104-1572

**Date**
08/09/2022

**Amount**
$5.00

**Cummul**
$5.00

**Result #273**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*RAE GROSS*
53 PALOMA AVE APT 2

**City State Zip**
VENICE
CA 90291-8739

**Date**
08/06/2022

**Amount**
$5.00

**Cummul**
$80.00

**Result #274**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*ROBERT BECKWITH*
4400 CENTRE AVE

**City State Zip**
PITTSBURGH
PA 15213-1455

**Date**
08/06/2022

**Amount**
$3.00

**Cummul**
$17.00

**Result #275**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**

*SUHAIL BANISTER*
2686 WOODINGTON CT

**City State Zip**
CANTON
MI 48188-2625

**Date**
07/23/2022

**Amount**
$3.00

**Cummul**
$12.00

**Result #276**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*DAVID PILEWSKIE*
1823 EL PARQUE CT APT A

**City State Zip**
SAN MATEO
CA 94403-2043

**Date**
08/19/2022

**Amount**
$3.00

**Cummul**
$15.00

**Result #277**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*DAVID PILEWSKIE*
1823 EL PARQUE CT APT A

**City State Zip**
SAN MATEO
CA 94403-2043

**Date**
07/19/2022

**Amount**
$3.00

**Cummul**
$12.00

**Result #278**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**

*JOHN ROBINSON*
650 EASTVIEW CT NE

**City State Zip**
GRAND RAPIDS
MI 49525-3359

**Date**
08/21/2022

**Amount**
$3.00

**Cummul**
$15.00

**Result #279**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*JOHN ROBINSON*
650 EASTVIEW CT NE

**City State Zip**
GRAND RAPIDS
MI 49525-3359

**Date**
07/21/2022

**Amount**
$3.00

**Cummul**
$12.00

**Result #280**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*MATT BARNETT*
265 E 237TH ST # 22

**City State Zip**
BRONX
NY 10470-2069

**Date**
08/02/2022

**Amount**
$2.50

**Cummul**
$2.50

**Result #281**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**

*JOSEPH MAJESKE*
100 S 4TH AVE

**City State Zip**
HIGHLAND PARK
NJ 08904-2623

**Date**
08/21/2022

**Amount**
$2.08

**Cummul**
$8.32

**Result #282**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*DENNIS GREENIA*
4514 KESWICK RD
HR DIRECTOR
GREEN AMERICA

**City State Zip**
BALTIMORE
MD 21210-2515

**Date**
08/20/2022

**Amount**
$2.08

**Cummul**

$135.40

**Result #283**

**Receiving Committee**

MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**

518210 – CAN

**Schedule Type**

DIRECT

**Description**

**Received From**

*DENNIS GREENIA*
4514 KESWICK RD
HR DIRECTOR
GREEN AMERICA

**City State Zip**

BALTIMORE
MD 21210-2515

**Date**

07/20/2022

**Amount**

$2.08

**Cummul**

$108.32

**Result #284**

**Receiving Committee**

MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**

518210 – CAN

**Schedule Type**

DIRECT

**Description**

**Received From**

*RAYA SAMET*
25960 STRATFORD PL

**City State Zip**

OAK PARK
MI 48237-1028

**Date**

07/30/2022

**Amount**

$2.00

**Cummul**

$21.00

**Result #285**

**Receiving Committee**

MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**

518210 – CAN

**Schedule Type**

DIRECT

**Description**

**Received From**

*JACKI ELLENBERGER*
813 PHEASANT CT

**City State Zip**

HUMMELSTOWN
PA 17036-8838

**Date**

08/20/2022

**Amount**

$2.00

**Cummul**

$10.00

**Result #286**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*RICK DUVALL*
313 S NINA PL

**City State Zip**
ANAHEIM
CA 92804-2628

**Date**
08/16/2022

**Amount**
$2.00

**Cummul**
$2.00

**Result #287**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**

*JOSEPH SACHTER*
6010 FIELDSTON RD

**City State Zip**
BRONX
NY 10471-1804

**Date**
08/19/2022

**Amount**
$2.00

**Cummul**
$13.00

**Result #288**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*PATRICIA JANENKO*
773 NW 13TH ST APT 502

**City State Zip**
GRESHAM
OR 97030-5575

**Date**
07/26/2022

**Amount**
$2.00

**Cummul**
$8.00

**Result #289**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*JOSEPH SACHTER*
6010 FIELDSTON RD

**City State Zip**
BRONX
NY 10471-1804

**Date**
07/19/2022

**Amount**
$2.00

**Cummul**
$11.00

**Result #290**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**

*JACKI ELLENBERGER*
813 PHEASANT CT

**City State Zip**
HUMMELSTOWN
PA 17036-8838

**Date**
07/20/2022

**Amount**
$2.00

**Cummul**
$8.00

**Result #291**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*JASON PELLERIN*
2328 HAISLEY DR

**City State Zip**
ANN ARBOR
MI 48103-3404

**Date**
07/23/2022

**Amount**
$1.67

**Cummul**
$30.06

**Result #292**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*NASTASSJA CHERNOFF*
1705 N AVENUE 55

**City State Zip**
LOS ANGELES
CA 90042-1108

**Date**
07/24/2022

**Amount**
$1.50

**Cummul**
$7.50

**Result #293**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**

*CYRUS NAHEEDY*
500 SNYDER AVE

**City State Zip**
ANN ARBOR
MI 48103-5553

**Date**
07/21/2022

**Amount**
$1.00

**Cummul**
$21.00

**Result #294**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*KARYSA KWASNIEWSKI*
2482 WICKFIELD RD

**City State Zip**
WEST BLOOMFIELD
MI 48323-3269

**Date**
07/18/2022

**Amount**
$1.00

**Cummul**
$12.00

**Result #295**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**
*CYRUS NAHEEDY*
500 SNYDER AVE

**City State Zip**
ANN ARBOR
MI 48103-5553

**Date**
08/21/2022

**Amount**
$1.00

**Cummul**
$22.00

**Result #296**

**Receiving Committee**
MALLORY MCMORROW FOR MICHIGAN

**Committee ID-Type**
518210 – CAN

**Schedule Type**
DIRECT

**Description**

**Received From**

*ROGER HELDER*
1203 E PARIS AVE SE

**City State Zip**
GRAND RAPIDS
MI 49546-6279

**Date**
07/24/2022

**Amount**
$1.00

**Cummul**
$19.00

**Matches** 251 - 296 of 296

« **Previous 50 matches**

# EXHIBIT J

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

| | |
|---|---|
| DONALD AGEE, JR., an individual, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>JOCELYN BENSON, in her official capacity as the Secretary of State of Michigan, *et al.*;<br><br>Defendants. | Case No. 1:22-cv-00272<br><br>**Three-Judge Panel Appointed Pursuant to 28 U.S.C. § 2284(a)** |

**AFFIDAVIT OF LAMAR LEMMONS III**

STATE OF MICHIGAN )
) ss.
COUNTY OF WAYNE )

I, LaMar Lemmons III, having been first duly sworn, deposes and states as follows:

1. I have personal knowledge concerning the statements contained in this Affidavit, and if called to testify, can testify competently to the facts stated in this Affidavit.

2. I executed an Affidavit in above captioned case on March 28, 2023. The contents of that Affidavit are incorporated by reference as if fully restated herein.

3. I have been married to Georgia Mae Lemmons ("Georgia") for roughly 34 years. Georgia is a Black woman, community educator and leader, and current resident of the City of Detroit, Michigan. In addition, Georgia has a Master of Education (M. Ed.) degree from Wayne State University.

4. Georgia was an at-large member of the Detroit Public Schools Board of Education, serving from 2017 to 2022. Georgia was also a certified teacher in the Detroit public school system for roughly 30 years and is now retired

5. Georgia and I have called the City of Detroit home for over 40 years and reside within the recently apportioned House District 13 and Senate District 10.

6. Under the previous district maps Georgia and I resided in Senate District 2, which was a Black-majority district. Our residence remains the same.

7. The recently apportioned district maps divided the previous Senate District 2 Black-majority across several new districts with a lower Black voting age population ("BVAP") than Senate District 2, including Senate District 10.

8. On April 19, 2022, Georgia filed paperwork to seek the Democratic Party nomination for the office of Michigan State Senator for District 10.

9. Relative to this election, I was Georgia's campaign manager, chief/main advisor, and was present for the entirety of her campaign and all major events.

10. Soon after Georgia filed paperwork to run for Senate District 10, a sitting Democratic Senator involved in the Senate Democratic leadership pressured me to have Georgia withdraw. At that time, I was the Chief of Staff to Democratic State Senator Betty Jean Alexander. This Senator was ranked higher in the party leadership than Senator Alexander, which only increased the pressure.

11. This pressure stemmed from the fact that due to the recent district reapportionments, incumbent Senator Paul Wojno would also be running in Senate District 10. Senator Wojno is a white man and was an incumbent Democratic Senator, whose previous Senate District boundary was in a predominately suburban, white area.

12. The Senator that pressured me indicated that if Georgia ran, the Democratic Party would support Senator Wojno and put the full weight of its resources behind him. The Democratic powers-at-be clearly wanted to protect Senator Wojno and ensure he ran unopposed in the 2022 Democratic Primary Election, as it typically remains neutral and does weigh in on primary races.

13. Due to this exerted pressure and because Senate District 10 featured a Black voting age population ("BVAP") of approximately only 40.4%, I advised Georgia to withdraw her candidacy.

14. Based on my personal experience and knowledge of the area's racially polarized voting patterns in Democratic primary elections, the BVAP in Senate District 10 was not high enough for Georgia to prevail in the 2022 Democratic Primary Election against Senator Wojno and/or other potential white candidates.

15. After reviewing this evidence and based on my advice as her campaign manager and advisor, Georgia ultimately withdrew her candidacy.

16. Georgia's withdrawal guaranteed that a Senate seat previously held by a Black Senator would be eliminated, as she was the only Black candidate for Senate District 10. Senator Wojno ran unopposed in the 2022 Democratic Primary Election and prevailed in the general election.

17. A similar situation from the 2022 election cycle can be found in the 2022 Democratic Primary Election for Senate District 11, which has a BVAP of only 19.2%. In that race Veronica Klinefeldt, a White council woman from Eastpointe and the clear White candidate of choice, defeated Monique Owens, a Black woman and first African American Mayor of Eastpointe. The Democratic Party supported and extended considerable financial resources toward Veronica Klinefeldt to defeat the Black candidate, despite not being an incumbent.

18. Both instances highlight the financial and incumbency disadvantages exacerbated by the Linden Plan that dissuade Black candidates from running for office.

19. These examples also illustrate that the BVAPs for those Senate Districts in the Detroit Metropolitan Area are far too low. As a result, the Linden Plan will and continue to prevent Black candidates of choice from prevailing in future elections, splinter Black communities of interest, dilute Black voting power, discourage Black candidates from running for office, and destroy the Detroit Democratic Black Caucus

20. If Senate District 10 had a BVAP above 50%, I would not have advised Georgia to withdraw her candidacy and I am certain she would have stayed in the race.

FURTHER AFFIANT SAYETH NOT.

I DECLARE THE ABOVE STATEMENTS TO BE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

LaMar Lemmons III

Dated: June 16, 2023

Subscribed and sworn to before me
this 16th day of June, 2023.

Mary M. LaCroix, Notary Public
Macomb County, Michigan.
My Commission Expires: March 19, 2029
Acting in the county of: Wayne

MARY M. LACROIX
NOTARY PUBLIC, STATE OF MI
COUNTY OF MACOMB
MY COMMISSION EXPIRES Mar 19, 2029
ACTING IN COUNTY OF Wayne