No. ____

IN THE

Supreme Court of the United States

MICHIGAN INDEPENDENT CITIZENS REDISTRICTING COMMISSION, et al.,
Defendant-Applicant,

v.

DONALD AGEE, JR., et al.,
Plaintiffs-Respondents,

&

JOCELYN BENSON, in her official capacity as Michigan Secretary of State,
Defendant-Respondent.

Emergency Application for Stay and Request for an Immediate Administrative Stay

To the Honorable Brett M. Kavanaugh
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Sixth Circuit

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PARTIES TO THE PROCEEDING

The parties to the proceeding below are as follows:

Defendant-Applicant Michigan Independent Citizens Redistricting Commission is the legislative body charged by Michigan's Constitution with configuring and adopting state senate, state house, and congressional voting districts. Defendant-Applicants Juanita Curry, Anthony Eid, Rhonda Lange, Steven Terry Lett, Brittni Kellom, Cynthia Orton, Rebecca Szetela, Janice Vallette, Erin Wagner, Richard Weiss, Elaine Andrade, Donna Callaghan, and Marcus Muldoon are commissioners of the Commission who were sued below in their official capacities and participate here in their official capacities. In addition, former Commissioners Douglas Clark, M.C. Rothhorn, and Dustin Witjes were defendants in the district court in their official capacities, but they resigned from their positions and were replaced by their successors by operation of law. *See* Fed. R. Civ. P. 25(d).

Plaintiff-Respondents Donald Agee, Jr., Jerome Bennett, Dennis Leory Black, Jr., Jamee Burbridge, Beverly Ann Burrell, Jemmell Cotton, Teresa DuBose, Karen Ferguson, Michelle Keeble, Kimberly Hill Knott, Barbara Gail London, Glenda McDonald, Janet Marie Overall, Shirley L. Radden, Davonte Sherard, Michelle T. Smith, Kenyetta Snapp, Donyale Stephen-Atara, Tanesha Wilson are individual voter residing in the Detroit-area districts challenged in this action. In addition, Norma McDaniel was a plaintiff in the district court, but her claims were dismissed on summary judgment.

Defendant-Respondent Jocelyn Benson is the Secretary of State of the State of Michigan, and was sued in her official capacity below.

RELATED PROCEEDINGS

United States District Court (W.D. Mich.):

> *Donald Agee, Jr. et al. v. Jocelyn Benson et al.*, No. 1:22-CV-00272-PLM-RMK-JTN, March 23, 2022.

United States District Court (W.D. Mich.):

> *Michael Banerian et al. v. Jocelyn Benson et al.*, No. 1:22-CV-00054-PLM-RMK-JTN, January 20, 2022.

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TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT:

Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. § 1651, applicants the Michigan Independent Citizens Redistricting Commission (the Commission) and its members in their official capacities respectfully apply to stay the injunction of a three-judge court of the Western District of Michigan (App., *infra*, 001a–116a), which enjoins the use of 13 legislative districts in future Michigan house and senate elections (including house elections in 2024), and to stay the ongoing remedial proceeding in the district court. The Court should also issue a prompt administrative stay pending resolution of this application. A stay is necessary to preserve the status quo as this Court considers the "sweeping holding" issued below that, if left undisturbed, "will have profound implications for the constitutional ideal of" equal protection, "for the future of the Voting Rights Act of 1965, and for the primacy of the State in managing its own elections." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 282 (2015) (Scalia, J., dissenting).

In configuring Detroit-area districts, the Commission did everything this Court's Voting Rights Act (VRA) and racial-gerrymandering precedents signals is necessary for voluntary VRA compliance, and it was not possible to do more than the Commission did. It employed a district-specific, functional analysis of racial voting patterns (a methodology the Court has embraced) that may be the most comprehensive ever adduced at the map-drawing phase of redistricting. Yet its plans still were found not to pass constitutional scrutiny. This Court's immediate intervention is necessary to remedy this untenable state of affairs, where voluntary §2 compliance has become impossible.

Last decade, federal courts (including this one) collectively found more than 50 legislative and congressional districts around the nation to violate the Equal Protection Clause under the doctrine of *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (*Shaw I*), which subjects voting districts to strict scrutiny if race was the predominant factor in their configuration, *Cooper v. Harris*, 581 U.S. 285, 300–01 (2017).[1] Each case involved a fact pattern where a redistricting authority attempted to comply with the VRA by drawing districts to a racial target it believed would provide equal electoral opportunity. Those efforts failed constitutional scrutiny because the redistricting authorities applied "a single, 'mechanically numerical'" target of minority voting-age population (typically black voting-age population (or BVAP)), but did not conduct a "functional analysis" to justify that target. *Bethune-Hill*, 326 F. Supp. at 176–80 (citation omitted); *see also, e.g.*, *Cooper*, 581 U.S. at 301–02; *Wisconsin Legislature*, 595 U.S. at 404. This Court criticized one legislature for drawing a district to hit the majority-minority line of *Bartlett v. Strickland*, 556 U.S. 1 (2009), without evaluating whether white crossover voting for black candidates of choice would ensure realistic black electoral opportunity without a BVAP majority. *Cooper*, 581 U.S. at 305–06 & n.5. And a three-judge district court whose judgment this Court summarily affirmed recommended "[a] district effectiveness analysis," which is "used to determine the minority voting-age population level at which a district becomes effective in providing a realistic opportunity" to elect. *Covington*, 316 F.R.D. at 169 n.46 (quotation and alteration marks omitted).

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[1] *Cooper*, 581 U.S. 285 (two districts invalidated); *Bethune-Hill v. Virginia State Bd. of Elections*, 326 F. Supp. 3d 128 (E.D. Va. 2018) (eleven); *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016) (twenty-eight), *aff'd*, 581 U.S. 1015 (2017); *Alabama Legislative Black Caucus v. Alabama*, 231 F. Supp. 3d 1026, 1033–34 (M.D. Ala. 2017) (twelve); *Abbott v. Perez*, 138 S. Ct. 2305, 2334–35 (2018) (one); *see also Wisconsin Legislature v. Wisconsin Elections Comm'n*, 595 U.S. 398, 400 (2022) (one).

These decisions led some to believe the path to §2 compliance (assuming §2 could still survive constitutional scrutiny) was through race-neutral redistricting. But this Court disagreed in *Allen v. Milligan*, 599 U.S. 1 (2023), holding that Congress retains authority under the Reconstruction Amendments to "authorize[] race-based redistrictings as a remedy for state districting maps that violate §2." *Id.* at 41. By consequence, states may not avoid §2 liability through race-blind line-drawing if the effect is to deny equal opportunity. To be sure, a race-blind approach will work if it happens not to "crack" or "pack" minority populations or if the state can otherwise mount successful after-the-fact defenses in §2 litigation under various relevant considerations. But this Court has stated that redistricting authorities may properly navigate the "competing hazards of liability" of the Fourteenth Amendment and the VRA by voluntary §2 compliance efforts *ex ante* that are "narrowly tailored," which occurs "if the State has 'good reasons' for believing that its decision is necessary in order to comply with the VRA." *Abbott*, 138 S. Ct. at 2315 (citations omitted). That doctrine, said this Court, provides the path "to harmonize these conflicting demands." *Id.*

The question in this case is whether that is true. In configuring Detroit-area legislative districts, the Commission neither applied mechanical thresholds nor left its §2 obligations to chance. It had the best of reasons not to do the latter. Early draft plans prepared without much or any attention to race contained Detroit-area districts with very high BVAPs (even exceeding 70%) and neighboring districts with very low BVAPs (falling below 30% and even 10%). One of the nation's leading voting-rights experts, Dr. Lisa Handley, advised that voting was racially polarized, and a former Department of Justice, Voting Rights Section, attorney warned of §2 liability in the

early drafts. The question became how to remedy the problem. Rather than pick a target like 50% or 55% BVAP, the Commission looked to "a functional analysis," *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 195 (2017), which compared rates of black cohesion, white crossover voting, and turnout by race.

In adjudicating the subsequent *Shaw* claim, the district court focused on the threshold predominance inquiry, "sometimes expressing disdain for a process that [this Court] ha[s] cautioned courts to respect." *Easley v. Cromartie*, 532 U.S. 234, 250 (2001) (*Cromartie II*). Applicants disagree with its finding that race predominated in all Detroit-area districts subject to this suit and strongly disagree with much of what the court said in arriving at it. However, recognizing the deference owed its fact-finding, applicants do not challenge the predominance determination at this time. What matters for present purposes is that its findings of fact *describe* narrow tailoring. The district court recounted how Detroit-area districts with high and low BVAPs gradually and loosely converged towards the range supported by evidence, to the result that six Detroit-area senate districts had BVAPs between 35% and 45% and sixteen Detroit-area house districts had BVAPs between 35% and 55%. In that way, the cracking and packing of draft maps was cured.

Despite that, the district court felt it could "make short[] work" of the narrow-tailoring inquiry, App. 112a, and its haste shows. The court did not determine that any of the *Gingles* preconditions were unmet on the Commission's record, find any technical or methodological error in Dr. Handley's analysis, identify what §2 goal the Commission should have had (if any), or explain what (if anything) should have been done with districts of very high and very low BVAPs. Importantly, respondents (plaintiffs below) did not advocate a race-blind redistricting. Their lead claims were under

§2, which they proposed mechanically requires five 50%+ BVAP senate districts and ten 50%+ BVAP house districts, a task their expert admitted (1) required race-based redistricting and (2) was not supported by a district-effectiveness analysis. The district court did not address respondents' §2 claims or say much of anything else informative about the statute. It nitpicked the advice the Commission received and summarily announced the §2 concern was "highly speculative." App. 113a.

When the decision below is added to the larger corpus of relevant case law, one basic rule emerges: whatever the legislative body did, it was wrong. The decision hollows out all meaning from what this Court has "said on many occasions": that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *see also Growe v. Emison*, 507 U.S. 25, 34 (1993). It also denies states the "broad discretion" this Court has afforded them "in drawing districts to comply with the mandate of § 2." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 429 (2006) (*LULAC*). Because this Court has yet to encounter a narrow-tailoring assertion built on anything like the analysis in this case, the Court is likely to note probable jurisdiction—and may do so in its discretion by means of this stay application. And, because at least five members of this Court are unlikely to conclude that states have no space for voluntary §2 compliance, there is more than a fair prospect that the decision will be reversed.

The equitable factors equally favor a stay. The injunction imposes irreparable harm as a matter of law both insofar as it enjoins Michigan law and insofar as it compels the Commission to undergo a difficult and strictly timed redistricting process to achieve a court-ordered deadlines that have yet to issue. That process will prove

uniquely difficult because the district court did not identify what federal law requires in this instance—whether it be 15 majority-minority districts; some smaller number of supermajority districts; or a race-blind draw, come what may. The district court set the Commission out to sea in a rudderless boat and is poised to issue orders in the coming days regulating its efforts. Meanwhile, Michigan's election process has already begun, and the district court's remedial process is likely to upend state-law deadlines to accommodate its campaign for new Detroit districts, which will prove difficult to administer on an expedited time frame before the August 2024 state house primary elections.

The Court should grant the application and issue a stay of the district court's injunction and remedial proceeding pending applicants' forthcoming appeal to this Court. The Court should also issue a prompt administrative stay pending resolution of this application. The Court would, in addition, be justified in construing this application as a jurisdictional statement, noting probable jurisdiction, and conducting prompt oral argument.

OPINIONS BELOW

The opinion and order of the district court holding 13 districts in Michigan's state house and senate plans unconstitutional and enjoining their use in future elections is unreported. It is available at 2023 WL 8826692 and is reproduced at App. 001a–114a. The order of the district court denying applicants' emergency motion for stay is unreported and is reproduced at App. 117a–121a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1253. The three-judge district court issued its injunction on December 21, 2023. App. 114a. Applicants filed a timely

notice of appeal and emergency motion to stay on January 4, 2024. D. Ct. Docs. 141, 142. The district court denied applicants' stay motion on January 8, 2024. App. 121a.

STATEMENT

A. Factual Background

1. After each decennial census, "[s]tates must redistrict to account for any changes or shifts in population." *Georgia v. Ashcroft*, 539 U.S. 461, 489 n.2 (2003). For most of Michigan's history, redistricting was the province of the State's legislature and, when it deadlocked, the courts. During the 2011 redistricting, the Republican Party controlled both houses of the legislature and the governorship. A federal court found that the legislature "packed" Democratic voters into Detroit-area districts, "making the surrounding districts . . . more Republican." *See League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867, 882–93 (E.D. Mich. 2019), *vacated sub nom*, 140 S. Ct. 429 (2019). The legislature defended this approach by claiming the VRA commanded a concentration of black voters into a few supermajority BVAP districts, which had the political benefit to Republicans of limiting black influence in neighboring districts. D. Ct. Doc. 106, 4 Trial Tr. 130:12–131:13.

In 2018, "voters in . . . Michigan approved [a] constitutional amendment[] creating [a] multimember commission[] that [is] responsible . . . for creating and approving district maps for congressional and legislative districts." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (citing Mich. Const. art. IV, § 6). The amendment vests redistricting authority with the Commission, which is composed of 13 registered voters, randomly selected by the Secretary of State, four of whom identify as Republicans, four of whom identify as Democrats, and five of whom affiliate with neither major party. Mich. Const. art. IV, § 6(2)(f). Individuals who in the past six years were

registered lobbyists, elected officials, candidates, employees of officials or candidates, or certain relatives of officials or candidates are ineligible for membership. *Id.* art. IV, § 6(1)(b) and (c); *see Daunt v. Benson*, 999 F.3d 299, 304 (6th Cir. 2021). The amendment is codified in a constitutional article titled "Legislative Branch," Mich. Const. art. IV, and declares that "the powers granted to the commission are legislative," *id.* art. IV, § 6(22). The amendment empowers the Commission to defend its plans in court and hire counsel of its choosing for that purpose, *id.* art. IV, § 6(6), and it declares that, "[i]n no event shall any body, except the independent citizens redistricting commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state," *id.* art. IV, § 6(19).

The amendment directs the Commission to draw districts according to seven redistricting criteria in descending "order of priority." *Banerian v. Benson*, 589 F. Supp. 3d 735, 736–37 (W.D. Mich. 2022) (*Banerian I*) (three-judge court) (quoting Mich. Const. art. IV, § 6(13)). These include that districts comply with federal law, be contiguous, "reflect the state's diverse population and communities of interest," "not favor or disfavor an incumbent elected official or a candidate," "not provide a disproportionate advantage to any political party," and "reflect consideration of county, city, and township boundaries." *Id.* art. IV, § 6(13); *see* App. 003a–04a.

2. The Commission first convened in September 2020 in preparation for its inaugural redistricting. But this decade's redistricting proved uniquely challenging because the U.S. Census Bureau was "six months late" in releasing the necessary redistricting census data due to the pandemic. *In re Indep. Citizens Redistricting Comm'n for State Legislative & Cong. Dist.'s Duty to Redraw Districts by Nov. 1, 2021*, 507 Mich. 1025, 961 N.W.2d 211, 212 (Mich. 2021) (Welch, J., concurring); App. 006a;

App. 115a (Neff, J., concurring). Despite these challenges, the Commission "act[ed] diligently pursuant to its constitutional mandate." *In re Indep. Citizens Redistricting Comm'n*, 961 N.W.2d at 212 (Welch, J., concurring). The Commission conducted a remarkably transparent process with widespread citizen participation, resulting in more than 10,000 transcript pages of public sessions that were live-streamed in real time. App. 002a. The Commission met or surpassed every metric of public observation and participation established in the State Constitution, holding nearly 140 public meetings as of the time it adopted redistricting plans and receiving nearly 30,000 public comments. *See Banerian v. Benson*, 597 F. Supp. 3d 1163, 1166 (W.D. Mich.) (*Banerian II*) (three-judge court), *appeal dismissed*, 143 S. Ct. 400 (2022).

3. The Commission was obligated by virtue of federal supremacy and the State Constitution to produce maps that "comply with the voting rights act and other federal laws." Mich. Const. art. IV, § 6(13)(a). The Commission recognized in advance of map-drawing that this would prove challenging, as Michigan's black population is concentrated in Detroit, and its "population is almost 80% African-American." App. 063a.

The Commission engaged accomplished advisors who "are highly respected in the redistricting field." App. 115a–16a (Neff, J., concurring). The Commission retained Dr. Handley, a political scientist and VRA expert who has about 40 years of experience as a VRA practitioner and academic, D. Ct. Doc. 106, 4 Trial Tr. 205:18–20, sits "at the top of the list" of "go-to" DOJ Voting Rights Section experts, D. Ct. Doc. 104, 3 Trial Tr. 185:15–24, and has prepared many plaintiff-side expert reports in successful §2 lawsuits, *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1309 (N.D. Ga. 2022) (in finding likelihood of success in §2 claim,

"[t]he Court found Dr. Handley's testimony to be credible and her analyses to be sound"); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 1:21-cv-05337, 2023 WL 7037537, at *116 (N.D. Ga. Oct. 26, 2023) (liability ruling on same basis); *United States v. City of Euclid*, 580 F. Supp. 2d 584, 607 (N.D. Ohio 2008) ("Through Dr. Handley's testimony . . . , the United States proved by a preponderance of the evidence that voting in Euclid is racially polarized."); *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 441 (S.D.N.Y. 2010) (finding §2 liability based on the "methods employed by Dr. Handley"); *Lopez v. Abbott*, 339 F. Supp. 3d 589, 610 (S.D. Tex. 2018) (finding §2 preconditions met based on opinions of Dr. Handley). It also engaged Bruce Adelson, a former DOJ Voting Rights Section attorney, to provide legal advice related to VRA compliance. Mr. Adelson received two outstanding achievement awards in the second Bush administration, D. Ct. Doc. 104, 3 Trial Tr. 178:4–10, he frequently advises redistricting authorities, and his advice to the Arizona Independent Redistricting Commission was unanimously ratified by this Court in *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253 (2016) (affirming *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042 (D. Ariz. 2014)).

Dr. Handley analyzed racial voting patterns in metropolitan Detroit, studying all 13 statewide general-election contests between 2012 and 2020, more than 50 district-level elections between 2018 and 2020, and "over 30 Democratic primaries." D. Ct. Doc. 106, 4 Trial Tr. 210:20–211:24. She examined these during the redistricting process, *id.* at 212:8–15, and compiled her iterative work in one final report, *id.* at 213:2–10; *see* App. 146a–236a.

Dr. Handley's analysis revealed that, in Detroit-area general elections, voting is racially polarized. All such elections in Oakland County (located just north of

Detroit), and more than half in Wayne County (which contains Detroit), displayed polarization. App. 245a; App. 128a. Black cohesion levels exceeded 90%, and white voters cohesively voted against black-preferred candidates in Wayne and Oakland Counties, App. 167a–68a. Dr. Handley concluded that, "[b]ecause voting in Michigan is racially polarized, districts that provide minority voters with an opportunity to elect their candidates of choice must be drawn." App. 162a.

However, Dr. Handley and Mr. Adelson advised the Commission not to pick "an arbitrary demographic target (e.g., 50% black voting age population) for all minority districts across the jurisdiction," but instead to look to "[a] district-specific, functional analysis . . . to determine if a proposed district will provide minority voters with the ability to elect minority-preferred candidates to office." App. 247a; *see* App. 008a–09a. To that end, Dr. Handley utilized the method she developed in the pioneering article Grofman, Handley, & Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C.L. Rev. 1383 (2000–2001), which this Court has cited favorably, *see Georgia*, 539 U.S. at 482–83. This method uses a mathematical formula that accounts for levels of black cohesion, white crossover voting, and turnout by race to calculate the percentage BVAP at which districts would afford black voters in the area a realistic opportunity to elect their candidates of choice. *See* App. 163a–66a; App. 248a–53a. Dr. Handley determined that BVAP percentage to be 35% in Wayne County and 40% in Oakland County. *See* App. 163a–66a; App. 008a–09a.

4. This analysis exposed problems in early draft plans commissioners had prepared. Draft plans contained districts with supermajority BVAP districts that far exceeded what black voters needed to have equal electoral opportunity, and

neighboring districts that fell below what black voters needed for that opportunity. For example, according to the district court's findings, an early senate plan contained three majority-BVAP districts in the Detroit area, including two with respective BVAPs of 76.56% and 63.77%, and neighboring districts of 7.8%, 10.98%, and 18.1% BVAP. App. 259a, 262a. As another example, an early house plan the district court analyzed contained six majority-minority districts with BVAPs running from 54.09% to 79.04% and neighboring districts, e.g., with BVAPs of 3.6%, 3.68%, 5.31%, 7.8%, 11.78%, 16.34%, and 28.62%. App. 266a, 272a; *see* App. 020a (partial display of relevant districts).[2] This pattern of BVAPs far exceeding 50% and falling below 30% (and even 10%) was consistent across early draft plans.

Around that time, the Commission's general counsel (Julianne Pastula) sent commissioners an email expressing that she and Mr. Adelson were "very concerned and alarmed" about "the packed districts" in draft plans, observing that the Commission would not be "able to justify the numbers coming out of today in a court." App. 012a. Following that and other iterations of similar advice, commissioners gradually drew BVAP down from supermajority levels and up from levels below 30%, as districts converged towards the 35% to 40% range, under Mr. Adelson's advice that there be "a little bit of a cushion" above the lowest point of the range, App. 013a. The district court tracked the progression of BVAPs that were dropped from supermajority levels and raised from low levels. *See, e.g.*, App. 014a, 20a, 26a, 32a, 34a, 38a, 49a. For example, senate district 1 began at 10.98% BVAP—a level that would not

[2] Differences in BVAPs reported by district between the trial exhibit and the district court's opinion arise because district numbers were changed between draft and final plans. The district court reported BVAP figures according to the final district numbering scheme, whereas the exhibit reports BVAPs by the draft numbering scheme.

plausibly afford equal black opportunity—and rose to 35.03% BVAP. App. 049a. As another example, house district 10 rose from 28.62% BVAP to 38.03% BVAP. App. 049a.

Ultimately, whereas early draft senate plans contained only three opportunity districts at supermajority levels, the enacted senate plan (named the Linden plan) resulted in six Detroit-area districts from 35% to 45% BVAP. App. 284a. In the final house plan (named the Hickory plan), the Commission arrived at 16 Detroit-area districts between 35.8% and 55.6% BVAP, App. 281a, whereas early plans contained lower numbers within that range.

5. Dr. Handley also examined dozens of Democratic primary election results, but she found they were not "particularly relevant to the mapmaking process for a number of reasons." App. 287a (4 Trial Tr. 226:9–10); App. 008a. There was only one statewide primary (which is necessary for a district-effectiveness analysis), which did not exhibit black cohesion and thus cut against the notion that §2 liability might arise at the primary-election phase. App. 287a (4 Trial Tr. 226:12–16). Half the district primaries were not polarized, App. 287a–88a (4 Trial Tr. 226:17–18), and black-preferred candidates prevailed in most polarized contests, App. 287a (4 Trial Tr. 226:17–18). Further, Dr. Handley observed that, where black-preferred candidates lost in polarized primaries, "there wasn't a clear relationship between the percentage BAVP of the district that they lost in and the loss of the candidate." App. 287a–88a (4 Trial Tr. 226:23–227:5). District lines did not appear to cause inequality of opportunity in the primaries. Rather, the barrier to equal opportunity identified in her analysis existed at the general-election stage.

Accordingly, Dr. Handley and Mr. Adelson did not advise the Commission to take any race-based action based on primary elections. In a December 2021 email to a commissioner who had raised concerns about primary elections, Dr. Handley advised that "[w]e simply do not know what would happen in a primary in which minority voters are cohesive" because "we do not have sufficient information to anticipate what might happen in the future Democratic primaries in the proposed districts." App. 051a. However, Dr. Handley performed a secondary analysis looking to Detroit-area Democratic primaries featuring minority candidates and determined that black-preferred candidates could prevail in Democratic primaries in districts as low as 26.53% BVAP. *See* App. 170a–71a; App. 255a.

6. On December 28, the Commission adopted the Linden and Hickory plans. The Linden plan received 9 of 13 votes from commissioners (two Democratic, two Republican and five independent members), and the Hickory plan received 11 of 13 (four Democratic, two Republican and five independent members).

In the subsequent 2022 elections, the Detroit-area districts provided much better than an equal opportunity for black voters to elect their preferred candidates. In 27 Detroit-area districts with BVAPs greater than 25%, black-preferred candidates had a combined success rate of 88.2% (27 of 27 general elections; 18 of 24 contested primaries). App. 155a–56a. The 2022 elections saw historic gains for black voters. The speaker of Michigan's house of representatives is black for the first time, D. Ct. Doc. 104, 3 Trial Tr. 123:19–23, and black representatives occupy districts with a footprint in Macomb County for the first time, including one who beat a white incumbent, D. Ct. Doc 104, 3 Trial Tr. 122:3–14.

B. Procedural Posture

1. In March 2022, respondents brought this suit against the Commission, its members in their official capacities, and Michigan's secretary of state. Respondents' complaint brought §2 and equal-protection challenges against seven Detroit-area senate districts and ten Detroit-area house districts that were below 50% BVAP, but not against the five majority-minority Detroit-area house districts.[3] App. 053a. A three-judge district court (Kethledge, Circuit Judge; Maloney and Neff, District Judges) was convened under 28 U.S.C. § 2284. *See Shapiro v. McManus*, 577 U.S. 39, 44 (2015).

In their §2 presentation, respondents sponsored an expert report demonstrating that ten majority-minority house districts and five majority-minority senate districts could be configured in the Detroit area. The expert who prepared these maps acknowledged at trial that race predominated, D. Ct. Doc. 102, 2 Trial Tr. 114:1–2, and that he did not conduct a functional analysis to determine whether 50% BVAP were necessary for black voters to elect their preferred candidates (in general or primary elections), D. Ct. Doc. 102, Trial Tr. 109:9–110:10.

The court narrowed the districts at issue in a summary-judgment ruling dismissing respondents' equal-protection claims against four districts and §2 claims against eight districts. App. 053a. The court conducted a six-day bench trial from November 1 to November 8, 2023.

2. On December 21, 2023, the district court issued a 114-page opinion finding equal-protection liability as to all remaining challenged districts and an

[3] The district court stated at one point that the Commission's plans included no majority-minority districts, App. 002a, but that is clearly erroneous, *see* App. 281a. The court was describing respondents' selection of districts to challenge, not the Commission's enacted plans.

injunction forbidding the use of those districts in future elections. App. 001a–114a. The court found that the commissioners—whom it criticized as coming "to their task with no experience in redistricting and no knowledge of election law"—"relied heavily on their experts' advice, particularly with regard to compliance with the federal Voting Rights Act." App. 001a–02a. That, according to the court, was the problem: by endeavoring to comply with §2, the court held, "the Commission drew the boundaries of plaintiffs' districts predominantly on the basis of race." App. 002a. The court devoted 111 pages to its predominance analysis, describing the advice the Commission received and its efforts to draw BVAPs down where they were high and up where they were low. *See* App. 001a–114a.

The district court then made "shorter work of the Commission's backup argument that its race-based line drawing can survive strict scrutiny." App. 112a. First, the court found there could be no concern with Detroit-area "packing" because this Court "has yet to hold that any district violated § 2 on grounds of packing." *Id.* Second, the court said Mr. Adelson's concern was "highly speculative" because only districts of an "excessive *majority*" could arguably be packed, which the court regarded as inconsistent with Mr. Adelson's and Dr. Handley's recommendation of a "35-45%" range. App. 112–13a. Third, the court held that the "factual premise" for the Commission's position was not "adequate" because Dr. Handley's advice was founded on general elections, not primary elections. App. 113a. The court did not say what information the Commission should have gleaned from primary elections and did not address the supermajority BVAP draft districts or those falling well below any arguable equal-opportunity threshold. Nor did the district court resolve respondents §2 claim. It therefore remains a mystery what §2 requires in the Detroit region.

Judge Neff concurred in the result, stating that, "[a]lthough the majority reaches the correct result, I write separately because I believe the opinion is unnecessarily harsh to the Commission, Bruce Adelson, and Lisa Handley." App. 115a. Judge Neff observed that the Commission's "difficult job" became "nearly impossible . . . when the pandemic hit in 2020," that commissioners "took the work seriously" and "worked hard to learn on the job," and that she did "not believe there was any ill intention by any individual in this case." App. 115a–16a. Commissioners, she concluded, did "all the best that could be expected." App. 116a.

3. After the December 21 injunction, three commissioners resigned. They were replaced through a constitutionally prescribed process on January 4, 2024, and the Commission's next act was to vote to appeal the injunction and seek a stay of the pending remedial process. The Commission filed its notice of appeal the same day, as well as a motion to stay the injunction in the district court. D. Ct. Docs. 141, 142. On January 5, the district court held a remedial hearing to hear competing positions of the parties on how to proceed with redistricting the Detroit-area districts in Michigan's house and senate plans. D. Ct. Doc. 155.

The court announced on the record at the hearing that it intended to deny the motion to stay, *id.* at 73:9–13, but did not issue an order to that effect until Monday, January 8. *See* App. 117a–121a. In the ruling, the court held again that "[t]he Commission cannot show it engaged in a narrowly tailored approach," stating that the "Commission had no data indicating how African American candidates of choice performed in the Democratic primaries in Detroit," App. 119a, again ignoring Dr. Handley's exhaustive analysis of primary elections and opinion that they provided inconclusive information, *see supra* pp. 13–14; App. 169a–71a (displaying primary election

analysis). In addressing the equities, the district court acknowledged that the Commission "can make a plausible showing that it will suffer irreparable harm" without a stay. App. 120a. It also recognized that "the Commission will face a tight timeline going forward as it endeavors to draw new Senate and House districts." App. 120a. But it found the equities favored respondents nonetheless. App. 120a. In response to the Commission's concern that respondents' §2 claims remained unresolved, and that the Commission's federal-law duties therefore remain unknown, the district court stated that "the Commission should . . . stop using the VRA as a proxy for race" and announced that "[t]he Court refuses to prescribe the Commission with a new racial target." App. 120a–21a.

The district court has yet to issue a remedial schedule. It has denied a request by respondents for special elections to the Michigan senate in 2024, "[t]he next Michigan Senate elections are in 2026," and the court has not yet identified a remedial deadline for the Commission to adopt a new senate plan. App. 121a. As for the house plan, the court ordered the Commission to publish proposed house maps for notice and comment by February 2, 2024, and that "[a] detailed scheduling order is forthcoming." App. 121a.

Applicants now renew their stay request in this Court.

ARGUMENT

This case involves a serious effort by serious people to do a serious thing. The Commission embraced the obligations Congress imposed on it under §2, hired the nation's preeminent advisors, and relied on a state-of-the-art analysis that may exceed in comprehensiveness anything any legislative body has ever relied on during redistricting. It completed its work in the most open and inclusive process in Michigan's history. If the decision below were deemed correct, it would mean no one in the

United States today has any clue what §2 compliance entails. That is an untenable situation that urgently calls for this Court's review—and reversal.

To obtain a stay pending appeal, an applicant must show (1) a reasonable probability that the Court will consider the case on the merits; (2) a fair prospect that a majority of the Court will vote to reverse the decision below; and (3) a likelihood that irreparable harm will result from the denial of a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* A stay preserving the status quo would follow a venerable line of precedent granting such relief in redistricting cases. *See, e.g.*, *North Carolina v. Covington*, 138 S. Ct. 974 (2018); *Abbott v. Perez*, 138 S. Ct. 49 (2017); *North Carolina v. Covington*, 137 S. Ct. 808 (2017); *Perry v. Perez*, 565 U.S. 1090 (2011); *Miller v. Johnson*, 512 U.S. 1283 (1994); *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers). The standard is met here.

I. The Court Is Likely To Note Probable Jurisdiction and Reverse

The first two stay factors are satisfied. The Commission's consideration of race did not "deny" anyone "the equal protection of the laws," U.S. Const. Amend. XIV, §1, because it "was narrowly tailored to achieve a compelling interest," *Bethune-Hill*, 580 U.S. at 193 (citation omitted). A racial-gerrymandering claim, which addresses racial classifications, is "analytically distinct from a vote dilution claim," which addresses voting mechanisms that "minimize or cancel out the voting potential of racial or ethnic minorities." *Miller v. Johnson*, 515 U.S. 900, 911 (1995). Because a racial classification that satisfies strict scrutiny is "benign," not invidious, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229 (1995), this Court's racial-gerrymandering precedents

have without exception proceeded in two stages, first asking whether race predominated and then asking whether the predominant use of race was narrowly tailored to a compelling interest, *see, e.g.*, *Miller*, 515 U.S. at 920–27; *Cooper*, 581 U.S. at 301–02; *Bethune-Hill*, 580 U.S. at 193–94. As noted, applicants do not agree with the district court's predominance finding. But, respecting the deference this Court owes district-court findings of fact, applicants rest this application on the narrow-tailoring inquiry.

This Court's precedent states that it has "assumed that complying with the VRA is a compelling state interest," i.e., that "compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed." *Abbott*, 138 S. Ct. at 2315. In truth, the Court has "done more than assume" this. Tr. of Oral Argument, No. 21-1086, *Merrill v. Milligan* at 56:4–7 (Barrett, J.). The Court upheld a Virginia legislative district under the narrow-tailoring inquiry, *Bethune-Hill*, 580 U.S. at 193–94, and the Court unanimously stated in *Cooper* that §2 justifies racially predominant redistricting "[i]f a State has good reasons to think that all the '*Gingles* preconditions' are met." 581 U.S. at 302. Respondents could hardly deny this, when their lead claim is a §2 claim (that was not resolved below).

This Court's decision last Term in *Milligan* implicitly decided this question. The Court had before it options for ending §2's application to single-member redistricting plans or construing it in a "race-neutral" manner, 599 U.S. at 30, and it declined, holding that Congress's authority to enforce the Fifteenth Amendment justifies "race-based redistricting." *Id.* at 41. In the strictest sense, then, §2 compliance is not a *state* interest, but an obligation Congress has imposed on the states within its "broad remedial powers," *Fullilove v. Klutznick*, 448 U.S. 448, 483 (1980) (plurality

opinion); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 487 (1989) (plurality opinion) ("Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment"); *id.* at 521–22 (Scalia, J., concurring in the judgment) (similar point). The Commission did not gratuitously derive a set of race-conscious goals suited to its own policy objectives. *See, e.g.*, App. 020a–27a (describing what the district court perceived to be departures from commissioners' redistricting preferences to achieve VRA compliance); *cf. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023). The Commission implemented what it believed to be the directive of Congress, based on this Court's precedents, and—because its view of that directive was well-founded—it can hardly be blamed for having done so.

It would make no sense—and would be profoundly unfair—to hold, on the one hand, that Congress may constitutionally impose §2's requirements on states and, on the other, that states may not constitutionally comply with them. *Abbott*, 138 S. Ct. at 2315 (recognizing the need to "harmonize" the "conflicting demands" of its precedents to avoid creating "competing hazards of liability" (citation omitted)). And while some Justices of this Court have dissented in varying degrees from this Court's §2 holdings, Michigan has no leeway to pick and choose among opinions in ascertaining its legal obligations. *Cf. Alabama Legislative Black Caucus*, 575 U.S. at 305 (Thomas, J., dissenting) ("[T]he State is not the one that is culpable.").

A. The Commission Had a Strong Basis in Evidence To Conclude That §2 Required Race-Based Redistricting

1. VRA §2 prohibits any voting "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. §10301(a). Such a violation occurs if "members

of a [protected] class . . . have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* §10301(b). A redistricting plan may violate §2 if it results in "the dispersal of blacks into districts in which they constitute an ineffective minority of voters or . . . the concentration of blacks into districts where they constitute an excessive majority." *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986). In plain English, §2 prohibits "the cracking or packing—whether intentional or not—of large and geographically compact minority populations." *Milligan*, 599 U.S. at 44 (Kavanaugh, J., concurring).

Contrary to the district court's suggestion that "packing" claims are not cognizable under §2, App. 112a, this Court has repeatedly recognized that §2 liability arises from "packing" minority group members "into one or a small number of districts to minimum their influence in the districts next door." *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994); *see also Voinovich v. Quilter*, 507 U.S. 146, 153–54 (1993). In function, packing and cracking feed into one another, because "packing dilutes the minority's ability to spread its influence among multiple, neighboring districts."[4] *NAACP v. Snyder*, 879 F. Supp. 2d 662, 677 (E.D. Mich. 2012); *see also Thomas v. Bryant*, 919 F.3d 298, 311 (5th Cir. 2019). For example, the *Milligan* case was decided in the district court—whose judgment this Court affirmed without modification—as both a cracking and packing claim, as the plaintiffs proved that "the Plan packs Black population into District 7 at an elevated level of over 55% BVAP, then cracks Black population in Mobile, Montgomery, and the rural Black Belt across Districts 1, 2, and 3, so that none of them has more than about 30% BVAP." *Singleton v. Merrill*, 582 F.

[4] In this respect, the district court's stay ruling erroneously considered only that the Commission "lowered BVAP levels in districts in metro Detroit," App. 119a, but failed to appreciate that, according to its own findings, the Commission also *raised* BVAPs, which was the probable result of lowering them in packed districts.

Supp. 3d 924, 961 (N.D. Ala. 2022); *see also id.* at 1014 (ultimate finding). The district court was therefore wrong in stating that this Court "has yet to hold that any district violated §2 on grounds of packing." App. 112a. Lower courts, too, have found liability, or likely liability, based on packing. *See, e.g.*, *Robinson v. Ardoin*, 86 F.4th 574, 585 (5th Cir. 2023) (affirming likelihood of success determination where challengers "claimed that the majority of black voters were 'packed' into the single black-majority district, and the remaining were 'cracked' among the other five districts."); *Bone Shirt v. Hazeltine*, 336 F.Supp.2d 976 (D.S.C 2004) (finding liability in a packing case); *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:22-cv-22, 2023 WL 2868670, at *1 (D.N.D. Apr. 10, 2023) (finding packing claim survived summary judgment).

2. A §2 challenger seeking to prove packing or cracking (or both) must prove "three threshold conditions": that the relevant minority group is "'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district"; that the group is "politically cohesive"; and that a white majority votes "'sufficiently as a bloc' to usually 'defeat the minority's preferred candidate.'" *Cooper*, 581 U.S. at 301–02 (quoting *Gingles*, 478 U.S. at 50–51). Accordingly, a state can establish narrow tailoring under §2 if it "has good reasons to think that all the '*Gingles* preconditions' are met." *Id.* at 302. The Commission had the strongest possible reasons to believe this.

First, the Commission had good reasons to believe the minority community in Detroit, with its nearly 80% black population, is "sufficiently large and geographically compact to constitute a majority" in reasonably configured districts. *Cooper*, 581 U.S. at 301 (citation omitted). Early draft house and senate maps contained districts in

Detroit exceeding the 50% BVAP mark, often by large margins. *See, e.g.*, App. 012a, 026a. Indeed, the principal concern was that the districts around Detroit were packed into "an excessive majority." *Gingles*, 478 U.S. at 46 n.11. Draft plans contained districts with very high BVAPs neighboring districts with very low BVAPs. *See supra* pp. 11–12. The drafts contained more starkly uneven population distributions than a plan that "packs Black population" into one district "at an elevated level over 55% BVAP" and cracks the remainder in districts "so that none of them has more than about 30% BVAP." *Singleton*, 582 F. Supp. 3d at 961.

The Commission also had good reasons to believe that—without opportunity districts—a future plaintiff could meet the second and third preconditions. It had what may be the most thorough polarized-voting analysis ever prepared at the map-drawing stage. Statewide general elections (reconstituted within counties having sufficient BVAP to produce reliable estimates of racial voting patterns) revealed that voting was racially polarized. All such elections in Oakland County, and more than half in Wayne County, displayed polarization. App. 245a. Black cohesion levels exceeded 90%, App. 245a, confirming that "a significant number of minority group members usually vote for the same candidates" in general elections—and thus that the second precondition was satisfied. *Gingles*, 478 U.S. at 56. And white voters cohesively voted against the black-preferred candidates in Wayne and Oakland Counties, App. 167a–68a, such that, without districts designed to afford equal opportunity, "a white bloc vote [would] normally . . . defeat the combined strength of minority support plus white 'crossover' votes" in general elections. *Gingles*, 478 U.S. at 56. The third precondition, too, would be satisfied without opportunity districts, which Dr. Handley advised the Commission to create. App. 162a.

Then, rather than rely on mechanical targets, Dr. Handley conducted "[a] district effectiveness analysis . . . to determine the minority voting-age population level at which a district becomes effective in providing a realistic opportunity" to elect. *Covington*, 316 F.R.D. at 169 n.46 (quotation and alteration marks omitted). This analysis showed that, if BVAPs fell below 35% in Wayne County and 40% in Oakland County, the districts may not provide equal black opportunity. *See* App. 162a–72a. Draft maps were vulnerable under that analysis. They concentrated black voting-age persons in six or so supermajority BVAP house districts and three supermajority BVAP senate districts and left remaining districts with BVAPs falling well below 30%, even down to single-digit levels. To satisfy the narrow-tailoring element, a redistricting authority "must assess whether the new districts it contemplates (not the old ones it sheds) conform to the VRA's requirements." *Cooper*, 581 U.S. at 303–04. The Commission had good reasons to believe the draft low-BVAP districts were cracked—because black-preferred candidates could not win there—and the supermajority-BVAP districts were packed—because they contained far more BVAP than necessary to secure equal electoral opportunity. On that foundation, the Commission's counsel warned of §2 liability. *See* App. 012a. Reasons for §2 compliance get no better than that.

B. The Commission's Use of Race Was Narrowly Tailored

The Commission's consideration of race was narrowly tailored "to prevent the cracking or packing." *Milligan*, 599 U.S. at 44 (Kavanaugh, J., concurring). Racial considerations are narrowly tailored if they adhere to "a functional analysis of the electoral behavior within the particular election district." *Bethune-Hill*, 580 U.S. at 194 (citation and alteration marks omitted). Redistricting authorities seeking to establish this defense must consider factors like "white crossover voting," minority

cohesion levels, and turnout to determine whether a proposed district will "allow the minority group to elect its favored candidates." *Cooper*, 581 U.S. at 304–05. Dr. Handley advised precisely that. App. 247a. She advised that the Commission not "simply set an arbitrary demographic target (*e.g.*, 50% black voting age population)," App. 247a, mirroring this Court's condemnation of "a mechanically numerical view" of VRA dictates, *Alabama Legislative Black Caucus*, 575 U.S. at 277; *see Cooper*, 581 U.S. at 305–06.

The Commission succeeded where the legislature in *Cooper* failed, as "it carefully evaluate[d] whether a plaintiff could establish the *Gingles* preconditions . . . in a new district[s] created without [race-based] measures." *Cooper*, 581 U.S. at, 304. The evidence before it showed, for example, that draft house district 9—at 3.68% BVAP—would not enable that tiny group of black voters to elect their preferred candidates and that draft house district 17—at 69.29% BVAP—would "waste" black votes. *See* App. 272a. This was a far more thorough and reliable analysis than this Court found sufficient in *Bethune-Hill*, where the architect of the plan "met with" the incumbent, "discussed the [relevant] district with [other] incumbents," and considered one primary election "in 2005." *Bethune-Hill*, 580 U.S. at 194–95; *cf. id.* at 203 (Thomas, J., concurring in part and dissenting in part) ("[T]hat back-of-the-envelope calculation does not qualify as rigorous analysis.").

In evening out BVAPs, the Commission avoided pitfalls identified in other racial-gerrymandering precedents that have repeatedly condemned high racial targets chosen with no analysis of crossover voting and turnout. *See Wis. Legislature*, 595 U.S. at 404; *Covington*, 316 F.R.D. at 175–76 (three-judge court); *Bethune-Hill*, 326 F. Supp. 3d at 175–80 (E.D. Va. 2018) (three-judge court). The gist of the district

court's predominance finding was that BVAPs fell from draft plans to final plans in those districts where it was high and rose in districts where it was low. That is what one should expect from a reasonably informed effort to cure cracking and packing: the BVAPs in supermajority-minority districts should come down and the BVAPs in surrounding districts should rise. Yet the district court did not consider its predominance findings in the narrow-tailoring analysis. *See* App. 112a–14a.

Nor did the Commission go "beyond what was reasonably necessary" to avoid §2 liability. *Shaw I*, 509 U.S. at 655. Its accuracy as to this range was (at best) loose, it did not insist on bringing all districts down even below 50% BVAP, and respondents do not allege that there are too many districts that afford equal black opportunity. Notably, where respondents propose five and ten majority-BVAP districts in the senate and house, respectively, the Commission provided a greater number of total opportunity districts by creating six senate and sixteen house opportunity districts—a strategy this Court has expressly ratified, *see Bartlett*, 556 U.S. at 23 ("various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or crossover districts" (citation and alteration marks omitted)). If this §2-compliance effort is not narrowly tailored, it is difficult to imagine what would be.

C. The District Court's Bases for Rejecting the Commission's Defense Lack Merit

1. The district court said nothing about this showing, which featured prominently, *inter alia*, in the Commission's post-trial briefing. D. Ct. Doc. 115 at 27–34. In an opinion that "sometimes express[ed] disdain for a process that [this Court] ha[s] cautioned courts to respect," *Cromartie II*, 532 U.S. at 250; *see* App. 115a–16a (Neff, J., concurring), the court felt entitled to "make shorter work" of the narrow-tailoring

analysis than the predominance analysis, App. 112a, spending barely two-and-a-half pages of its decision on it, *id.* at 112a–14a. But narrow tailoring often presents "[t]he more substantial question" in cases where a redistricting authority admittedly endeavors to comply with §2. *Cooper*, 581 U.S. at 301; *see Abbott*, 138 S. Ct. 2334–35. Prior decisions applying this test devoted considerably more attention to this sensitive inquiry, even where there was "no evidence . . . showing that the legislature engaged in an analysis of *any* kind," *Bethune-Hill*, 326 F. Supp. 3d at 176; *see id.* at 175–80; *see also, e.g.*, *Covington*, 316 F.R.D. at 166–176.

Here, the district court had an 80-page expert report (including an analysis of dozens of primary elections, App. 153a–158a) recording what the Commission learned from its expert, various presentations Dr. Handley and Mr. Adelson delivered to the Commission, a 10,000-page legislative record documenting all the Commission's activities, and the trial testimony of both Dr. Handley and Mr. Adelson to weigh. The narrow-tailoring portion of its opinion addresses practically none of it. This Court has directed lower courts "to exercise extraordinary caution in adjudicating" racial-gerrymandering claims, *Miller*, 515 U.S. at 916, yet perhaps no decision to date has been so dismissive of states' obligations under the VRA or of sincere and well-founded efforts to fulfill them.

The district court did not address any of the *Gingles* preconditions or determine whether the Commission had good reasons to believe they were satisfied. *Compare* App. 112a–14a *with Cooper*, 581 U.S. at 301–02. It therefore did not find, and could not have found, that the Commission lacked good reasons to use race in *some* way, and respondents' expert admitted that the VRA required race-based redistricting. The district court did not address its own charts demonstrating the very high and low

BVAPs of adjacent Detroit-area districts or suggest what the Commission should have done about that unevenness. The district court did not examine Dr. Handley's polarization analysis or identify any error of methodology (or anything else) in it. It did not even cite most of this Court's recent narrow-tailoring case law, including *Cooper*, *Bethune-Hill*, *Alabama Legislative Black Caucus*, *Abbott*, and the summary affirmance in *Covington*. It did not say whether it believed the Commission misread the results of its "district effectiveness analysis," *Covington*, 316 F.R.D. at 169 n.46, or whether it believed the Commission should not have undertaken such an analysis at all.

2. What the district court said about narrow tailoring was without merit.

First, it focused on the packing component of the Commission's narrow-tailoring argument and found the Commission's concerns "highly speculative" because of the absence of case law from this Court on packing. App. 112a–13a. That was erroneous for reasons explained. *See supra* pp. 22–23.

Second, the court called the Commission's theory "meritless" on the basis "that BVAPs above 35-45% BVAP" could not "amount to 'packing.'" App. 112a. However, without the use of race, the plans would likely have contained districts of more than *70%* BVAP and less than *30%* BVAP (even *10%* BVAP), which raises "'good reasons' to think that [the plans] would transgress the Act if [the Commission] did not draw race-based district lines." *Cooper*, 581 U.S. at 293 (citation omitted). The question became *what* goal should guide the drawing down of high BVAP districts and drawing up of low BVAP districts and *how* that goal should be derived. To be precise, the question was how far BVAP in the packed districts could come down without compromising their status as opportunity districts and how far up the BVAP in cracked

districts would need to rise for them to become opportunity districts. The Commission addressed that problem by converging district BVAPs loosely toward the range Dr. Handley identified, and it was narrowly tailored because the "evidence" supported that goal. *Cooper*, 581 U.S. at 306.

Third, the district court suggested the Commission erred in *not* utilizing a mechanical BVAP threshold, finding that districts would need to have an "excessive *majority*" in BVAP to justify the Commission's concerns. App. 112a (citation omitted). Excessive-majority BVAP districts were before the Commission. And, to the extent the district court's vague discussion meant that the Commission should have targeted the majority-minority line (50% plus one BVAP), instead of a range below 50%, its holding contravenes *Cooper*, which rejected the argument that "whenever a legislature *can* draw a majority-minority district, it *must* do so," 581 U.S. at 305. Authorities seeking to tailor their use of race must consider whether "a crossover district would also allow the minority group to elect its favored candidates," given that §2 can be "*satisfied* by crossover districts," *Cooper*, 581 U.S. at 305. *Cooper* held that it is improper for states to target the majority-minority mark merely because *Bartlett* applied a majority-minority rule under "the first *Gingles* precondition," such that groups falling short of a majority in the relevant area have no §2 remedy. *Id.* The district court criticized the Commission for not using 50% racial targets, contending that the Commission "limited these plaintiffs to a political *minority* in their districts." App. 113a. That ignores the evidence before the Commission that Detroit-area districts did not need BVAP majorities to enable black voters to elect candidates of their choosing, due to white crossover voting. A 50% target would not have been narrowly tailored.

3. Echoing in part the arguments respondents proffered in support of their §2 claim, the district court also found the Commission lacked an "adequate basis for the factual premise of its theory" because its analysis "lacked any primary-election data that was relevant to whether black voters could elect their preferred candidates at these BVAP levels." App. 113a; *see also* App. 120a–21a. This position "ask[ed] too much from state officials charged with the sensitive duty of reapportioning legislative districts." *Bethune-Hill*, 580 U.S. at 195. The narrow tailoring inquiry asks whether the redistricting authority had "'good reasons' for thinking that the [VRA] demanded" the "steps" it actually took, *Cooper*, 581 U.S. at 301, not whether other bases in evidence might support alternative choices. Having found a probable §2 violation under general-election data, the Commission was justified in remedying it. It did not have to guess that future challengers would rely on primary data. This Court's precedent, after all, has looked to "general elections" in the narrow-tailoring inquiry and has never held that examining primary elections is essential. *See id.* at 295, 301–06. The district court did not explain what the Commission should have discerned from primary elections, and respondents' arguments based on primary results were properly directed to their (unresolved) §2 claims, not to their equal-protection claims.

Besides, Dr. Handley *analyzed* primaries and testified they did not provide a basis in evidence to do anything race-related. App. 287a–88a (4 Trial Tr. 226:5–227:5). The district court did not address her analysis or find any fault in it, and it inexplicably claimed in its stay ruling that "the Commission had no data indicating how African American candidates of choice performed in the Democratic primaries in Detroit." App. 119a–20a. That is clearly erroneous. *See* App. 169a–71a; App. 254a–55a; App. 276a–77a. Because §2 "requires that minorities have an equal opportunity

to participate not only in primary elections but also in general elections," "these two phases of the single election cycle must be separately considered and analyzed." *Lewis v. Alamance Cnty., N.C.*, 99 F.3d 600, 616 (4th Cir. 1996) (Luttig, J., for the court). That is what Dr. Handley did. As described, her analysis of general elections revealed a barrier to equal opportunity at *that* stage and concomitant §2 vulnerabilities. Her analysis did not reveal a barrier to equal opportunity at the primary stage. The district court oddly announced that "everyone agrees" the primary elections supply the relevant information, App. 113a, which was not true and clearly erroneous, *see* D. Ct. Doc. 115 at 31–33; App. 276a–77a.

It also cited Dr. Handley's contemporaneous observation to one commissioner that "we simply do not know" how black-preferred candidates would fare in polarized primaries. App. 113a. But that only proved the Commission's good reasons for not relying on primaries. As Dr. Handley's report to the Commission explained, future primary results would pose a §2 problem "*only if* voting in Democratic primaries is racially polarized." App. 169a (emphasis added). Without a strong basis in evidence to conclude that Democratic primaries *would* be racially polarized, there was "no evidence that a §2 plaintiff could demonstrate the [second or] third *Gingles* prerequisite" and thus no basis to do *anything* race-related with respect to primaries. *Cooper*, 581 U.S. at 302. The district court's suggestion that the Commission was supposed to pick higher BVAP targets based on what it "simply d[id] not know," App. 113a, cuts against everything this Court has said in recent years about narrow tailoring.

The district court's stay ruling confused matters further. It criticized Dr. Handley's analysis as "incomplete"—again, without addressing Dr. Handley's analysis of primaries—and then made the curious assertion that it "refuses to prescribe the

Commission with a new racial target" and advised it to "stop using the VRA as a proxy for race." App. 120a–21a. But if the failure to consider primaries were truly the Commission's error, a proper analysis of that data would likely point to a *different* racial goal, such as the majority-minority goal respondents vigorously proposed below. After all, respondents' position all along has been that BVAPs between 35% and 45% are too low.

4. The district court also ignored that "States retain broad discretion in drawing districts to comply with the mandate of § 2." *Shaw v. Hunt*, 517 U.S. 899, 917, n. 9 (1996) (*Shaw II*); *accord LULAC*, 548 U.S. at 429. Even assuming the Commission could have permissibly selected a higher BVAP goal, such as the 50% mark, the narrow-tailoring inquiry "cannot insist that a state legislature . . . determine *precisely* what percent minority population" the VRA "demands." *Bethune-Hill*, 580 U.S. at 195. Moreover, this Court has said that states may create crossover districts "as a matter of legislative choice or discretion," and that this "option . . . gives legislatures a choice that can lead to less racial isolation, not more." *Bartlett*, 556 U.S. at 23 (plurality opinion). Majority-minority districts "rely on a quintessentially race-conscious calculus aptly described as the 'politics of second best,'" and this Court has discouraged them in "communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." *Johnson*, 512 U.S. at 1020 (citation omitted). To compel states to draw majority-minority districts even where crossover districts perform would "tend to entrench the very practices and stereotypes the Equal Protection Clause is set against." *Johnson*, 512 U.S. at 1029 (Kennedy, J., concurring in part and concurring in the judgment).

To properly account for states' legitimate discretion, the narrow tailoring inquiry must accommodate multiple reasonable §2-compliance routes if they exist, as would (at a minimum) be the case here. If the possibility of majority-minority districts establishes that districts below a majority (here, crossover districts) are not narrowly tailored, and the possibility of crossover districts proves that majority-minority districts are not narrowly tailored, then the options for §2 compliance would cancel each other out. But the concept of "discretion," *Shaw II*, 517 U.S. at 917 n. 9, implies more than one path to the same goal. VRA §2 compliance under the narrow-tailoring route would become impossible under the district court's view of the inquiry, and states' only option would be to close their eyes to race, get sued, and find out in court what §2 requires.

C. The Stay Factors Are Satisfied

For the foregoing reasons, the first two stay factors are satisfied. *See Hollingsworth*, 558 U.S. at 190. This Court has yet to encounter a narrow-tailoring effort as thoroughly supported in an evidentiary record as this, and—at a minimum—this case is not a serious candidate for summary affirmance, especially where the Commission followed this Court's repeated admonition to rely on "a functional analysis." *Bethune-Hill*, 580 U.S. at 195. This case falls within a right of direct appeal from a three-judge court, so the Court will note probable jurisdiction unless "the questions are so insubstantial as not to justify hearing argument." Stephen M. Shapiro, et al., Supreme Court Practice, § 7-11, p. 7-29 (11th Ed. June 2019); *Cox v. Larios*, 542 U.S. 947, 947 (2004) (Scalia, J., dissenting) ("This is not a petition for certiorari, however, but an appeal, and we should not summarily affirm unless it is clear that the disposition of this case is correct."). The issues here are of such profound importance that

the certiorari standard, too, would be met if it applied. Indeed, even the question whether primary (versus general) election data is essential for the narrow-tailoring inquiry is novel and calls for this Court's fulsome review. And at least five Justices of this Court are likely to vote to reverse because the district court's analysis cannot be correct, for reasons explained.

II. The Remaining Factors Overwhelmingly Favor a Stay

Absent a stay from this Court, the lower courts' orders will upend the status quo and compel Michigan into new legislative redistricting plans, even as this Court determines whether the challenged plans satisfy constitutional scrutiny.

1. The irreparable-harm element is satisfied as a matter of law, given that "the [State's] inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott*, 138 S. Ct. at 2324, n.17; *see also Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *Miller*, 515 U.S. at 915 ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions."). The district court acknowledged that this element favors the Commission. App. 120a. The Michigan Constitution vests vindication of the State's relevant interests in the Commission, *see* Mich. Const. art. 4, § 6(6), consistent with Michigan's sovereign authority to choose what parties may "participate in litigation on the State's behalf," including "with counsel of their own choosing." *Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2197 (2022).

It is a second irreparable injury that the Commission will (without a stay) be obligated to "adopt an alternative redistricting plan before" a date of the district

court's choosing "or face the prospect that the District Court will implement its own redistricting plan." *Karcher*, 455 U.S. at 1306 (Brennan, J., in chambers). In *Karcher*, Justice Brennan determined that the irreparable-harm element was met (and a stay warranted) because of this choice facing the New Jersey legislature, *see id.*, and the district court acknowledge that "[t]here's no doubt the Commission will face a tight timeline going forward as it endeavors to draw new Senate and House districts." App. 120a.

The harms are even more pronounced here because of factors unique to Michigan. The 2018 amendment to the State Constitution declared an express policy that "[i]n no event shall any body, except the independent citizens redistricting commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state." Mich. Const. Art. IV, § 6(19). Even if the Commission succeeds in redistricting on tight deadlines that will be imposed upon it, irreparable harm will result from the truncated process that may thwart State constitutional directives as to the house plan. The 2018 amendment directs the Commission to conduct hearings and a 45-day notice-and-comment period, Mich. Const. Art. IV, § 6(9) and (14)(b), that will be difficult (even impossible) to conduct consistent with election timelines in 2024. The people of Michigan created "a redistricting plan animated by a principle of self-determinism," such that "public comments" inform how the Commission "draw[s] the district lines." *Banerian II*, 597 F. Supp. 3d at 1167. While the district court has yet to identify a timeline for reconfiguring house districts, it is unlikely to provide the Commission with an ample opportunity for fulsome public comment, which requires that map-drawing be measured in months, not days. The people of Michigan, however, have stated that only plans produced by the Commission "acting pursuant to

this section" should govern Michigan elections. *Id.* art. IV, § 6(19). A process in contravention of the State Constitution irreparably harms the state.

2. There is more. The Commission's task is uniquely difficult among remedial tasks because the district court did not adjudicate respondents' §2 claims. Thus, while the district court has declared its view of what §2 strategy is not supportable, it did not indicate what strategy is correct. This case therefore stands in contrast to other redistricting injunctions providing such clarity. *See, e.g.*, *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 766 (M.D. La.) (after issuing preliminary injunction, holding: "The appropriate remedy in this context is a remedial congressional redistricting plan that includes an additional majority-Black congressional district."), *stay and certiorari granted before judgment* 142 S. Ct. 2892 (2022).

A racial-gerrymandering plaintiff "ask[s] for the elimination of a racial classification." *Rucho*, 139 S. Ct. at 2502. But respondents here did not want that: they wanted plans with specified numbers of majority-black districts, which their expert acknowledged would be race-based plans. Because the district court did not adjudicate that claim, the Commission is faced with the difficult task of discerning whether to draw without racial considerations or whether to employ *different* ones. Similarly, while the district court suggested that primary data provides the useful information, it made no determination about what those data show. Notably, plans respondents proposed in their first remedial filing raise difficult §2 questions. For example, their senate plan contains three majority-minority districts of roughly 68%, 58%, and 55% BVAP neighboring districts below 20% BVAP, *see* D. Ct. Doc. 136-3 at 14, which would stand condemned by comparison to respondents' own liability-phase map, which contained *five* majority-Black Detroit-area districts. Had the Commission adopted this

new plan, it might have been invalidated in *this* lawsuit by the advocacy of *these* respondents, *their* counsel, and *their* expert.[5]

In sum, the district court forced the Commission to navigate the "competing hazards of liability" in a rudderless boat. *Abbott*, 138 S. Ct. at 2315 (citation omitted). In seeking to assuage this concern, the district court's stay ruling (as noted) suggested the Commission's task is as simple as not "using the VRA as a proxy for race." App. 121a. But that curious verbal formulation misses that, where §2's prerequisites are satisfied, the statute "insists that districts be created precisely because of race." *Abbott*, 138 S. Ct. at 2314. The Commission's record found §2's prerequisites satisfied (and the district court did not disagree), respondents insisted below that they were satisfied (albeit to direct a different racial goal), and the district court's remedial role includes assessing whether a plan the Commission adduces complies with all dictates of federal law, including the VRA, *see Perry v. Perez*, 565 U.S. 388, 393 (2012). It makes no sense for the district court to summarily announce it "refuses to prescribe the Commission with a new racial target," App. 121a, when it did not find that §2's prerequisites are unmet (either for primary or general elections). This sets the Commission up for failure later.

3. The irreparable-harm element as to the injunction against the house districts should further be informed by "considerations specific to election cases."

[5] To make matters worse, at the January 5 remedial hearing, members of the court suggested that attorneys from Baker & Hostetler, LLP, the firm that represented the Commission at trial, should not advise the Commission about Voting Rights Act issues as they relate to the remedial process, *see, e.g.*, D. Ct. Doc. 155 at 67:21–24, even though the firm is best positioned to advise on what may properly be gleaned from the trial record and the opinion below. We are unaware of any redistricting case where a court has attempted to exert control over a legislative body's choice of advisors at any juncture of redistricting or redistricting litigation.

Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam). Under the *Purcell* principle, "federal district courts ordinarily should not enjoin state election laws in the period close to an election, and . . . federal appellate courts should stay injunctions when . . . lower federal courts contravene that principle." *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). The *Purcell* principle applies here as to the house plan because the "State's election machinery is already in progress," *Reynolds v. Sims*, 377 U.S. 533, 585 (1964), as Michigan's secretary of state advised the district court, *see* D. Ct. Doc. 113 at 2–4. The district court has announced that one or more remedial orders are forthcoming to place strict temporal (and possibly other) limits on the Commission's redistricting effort, and those orders will likely have to upend state-law requirements.

To be sure, the Commission recognizes that the timing of the district court's injunction with sufficient time for a highly compressed redistricting does not so thoroughly threaten "chaos" such that the *Purcell* principle commands a stay standing alone. *See Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). Nevertheless, it is clear that the injunction injects federal power into election-preparation efforts, such that state laws, procedures, and best practices will be stretched and overridden to some degree. This factor, when combined with the others, confirms that irreparable harm stands at its paramount level.

4. The three stay factors are amply satisfied, so this is not among the "close cases" where it is appropriate to "weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190. Even if it were, the balance of equities favors applicants, as it has favored states in many redistricting stay proceedings, *see*

supra 19. Although the district court believed this factor favors respondents' right to "maps that are not racially gerrymandered," App. 120a, this again ignored that respondents' principal contention below was, not that they are entitled to redistricting free from racial classifications, but that the Commission should have employed different classifications—indeed, the very types of classifications that this Court has held do *not* satisfy strict scrutiny, *Cooper*, 581 U.S. at 301–02; *Wisconsin Legislature*, 595 U.S. at 404. The district court did not determine whether they established a right to race-based districts in the form of five and ten majority-black senate and house districts, respectively. Because it is a mystery what respondents' rights are, it is difficult to understand how such rights could weigh heavily in the balance of equities or how a vaguely defined right to maps "that are not racially gerrymandered" can even be understood. App. 120a. By comparison, the harms running the other way are, as shown, discrete, palpable, and well established in law.

CONCLUSION

The Court should grant the application and issue a stay of the district court's injunction and remedial proceeding pending applicants' forthcoming appeal to this Court. The Court should also issue a prompt administrative stay pending resolution of this application. The Court would, in addition, be justified in construing this application as a jurisdictional statement, noting probable jurisdiction, and conducting prompt oral argument.

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Respectfully Submitted,

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