UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL BANERIAN; *et al.*,

Plaintiffs,

v.

Case No. 1:22-CV-00054-PLM-SJB

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

Defendants,

and

JOAN SWARTZ MCKAY; GRACE HUIZINGA; SAMANTHA NEUHAUS; JORDAN NEUHAUS; CAYLEY WINTERS; GLENNA DEJONG; MARSHA CASPAR; HEDWIG KAUFMAN; COLLIN CHRISTNER; MELANY MACK; ASHLEY PREW; SYBIL BADE; SUSAN DILIBERTI; LISA WIGNET; MATTHEW WIGNET; PAMELA TESSIER; and SUSANNAH GOODMAN,

Proposed Intervenor-Defendants.

PROPOSED INTERVENOR-DEFENDANTS' PARTIAL MOTION TO DISMISS

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PROPOSED INTERVENOR-DEFENDANTS' PARTIAL MOTION TO DISMISS

Proposed Intervenor-Defendants ("Proposed Intervenors"), by counsel, move this Court to dismiss Count II of Plaintiffs' First Amended Complaint under Fed. R. Civ. P. 12(b)(6). Dismissal is necessary under Rule 12(b)(6) because the factual allegations in the complaint, even if true, are

insufficient to state a federal claim under the Fourteenth Amendment to the United States Constitution.

Accordingly, for the reasons explained above and in greater detail in their supporting brief, Proposed Intervenors respectfully request that this Court dismiss Count II of Plaintiffs' Amended Complaint.

Date: February 2, 2022

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**Motions for Admission Forthcoming*

CERTIFICATE OF SERVICE

Sarah S. Prescott certifies that on the 2nd day of February 2022, she served a copy of the above document in this matter on all counsel of record and parties via the ECF system.

/s/ Sarah S. Prescott
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UNITED STATES DISTRICT COURT
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PROPOSED INTERVENOR-DEFENDANTS' BRIEF IN SUPPORT OF PARTIAL MOTION TO DISMISS

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PROPOSED INTERVENOR-DEFENDANTS' BRIEF IN SUPPORT OF PARTIAL MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Proposed Intervenor-Defendants ("Proposed Intervenors") move this Court to dismiss Count II of Plaintiffs' First Amended Complaint ("Amended Complaint").

INTRODUCTION

In Count II of their Amended Complaint, Plaintiffs attempt to invent a federal claim where none exists. Dressed up in the language of the Fourteenth Amendment, Count II amounts to nothing more than a claim that the Michigan Independent Citizens Redistricting Commission (the "Commission") violated the Michigan Constitution. The Michigan Constitution provides a forum for such claims—the Michigan Supreme Court. *See* Mich. Const. Art. IV, § 6(19) ("The supreme court, in the exercise of original jurisdiction . . . may review a challenge to any plan adopted by the commission"). If this Court were to entertain such a claim, based entirely on state law, it would upend decades of Supreme Court and Sixth Circuit precedent prohibiting a federal court from granting "relief against state officials on the basis of state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

Even if the Court were inclined to take this dramatic and unprecedented step, Plaintiffs' allegations in Count II—which state that the Commission violated the Michigan Constitution by failing to include political boundaries as part of "communities of interest"—are without merit. The Michigan Constitution definitively forecloses Plaintiffs' claim, and it therefore fails as a matter of law.

This Court should not entertain Plaintiffs' invitation to upend our federal system, particularly in a case where the underlying state law claim is itself non-meritorious. This Court should dismiss Count II of Plaintiffs' Amended Complaint.

STATEMENT OF FACTS

In November 2018, Michiganders voted overwhelmingly in favor of Proposal 2, which vested the power to draw redistricting maps in the Commission. Now codified as Article IV, § 6 of the Michigan Constitution, this constitutional amendment requires the Commission to enact congressional districts that comply with certain redistricting criteria. Specifically, Article IV, § 6(13) of the Michigan Constitution states:

> The commission shall abide by the following criteria in proposing and adopting each plan, in order of priority:
>
> (a) Districts shall be of equal population as mandated by the United States constitution, and shall comply with the voting rights act and other federal laws.
>
> (b) Districts shall be geographically contiguous. Island areas are considered to be contiguous by land to the county of which they are a part.
>
> (c) 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.
>
> (d) Districts shall not provide a disproportionate advantage to any political party. A disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness.
>
> (e) Districts shall not favor or disfavor an incumbent elected official or a candidate.
>
> (f) Districts shall reflect consideration of county, city, and township boundaries.
>
> (g) Districts shall be reasonably compact.

Mich. Const. Article IV, § 6(13). The constitution confers upon the Michigan Supreme Court "original jurisdiction" to "review a challenge to any plan adopted by the commission," requiring that the court "shall remand a plan to the commission for further action if the plan fails to comply with the requirements of this constitution, the constitution of the United States or superseding federal law." *Id.* § 6(19). It further provides that "[i]n no event shall any body, except the independent citizens redistricting commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state." *Id.* On December 28, 2021, after months of deliberation and 45 days of public comment pursuant to Article IV § 6, including a great deal of

comment regarding what constituted a "community of interest,"[1] the Commission voted to approve a congressional map—referred to by the Commission as the "Chestnut Plan."[2] The Chestnut Plan was supported by commissioners who affiliate as Republicans and as Democrats, as well as those who do not affiliate with a major political party.[3]

On January 5, 2022, pursuant to Article IV, § 6(19), a group of plaintiffs filed a case in the Michigan Supreme Court alleging that the congressional, State Senate, and State House maps violate the federal Voting Rights Act. *See* Compl., *Detroit Caucus v. Mich. Indep. Citizens Redistricting Comm'n*, MSC 163926 (Mich. Jan. 5, 2022). More than two weeks later, Plaintiffs filed this lawsuit against the congressional map alleging (1) that it violates Article I, Section 2 of the United States Constitution for failing to minimize population deviations among the districts, and (2) that it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by "fail[ing] to draw Michigan's congressional maps in accordance with neutral, and traditionally accepted, redistricting criteria. . . ." Compl. ¶ 6, ECF No. 1. On January 27, Plaintiffs amended their complaint and moved for a preliminary injunction. As part of their Prayer for Relief, Plaintiffs request that this Court "[e]stablish a deadline by which the Commissioners must redraw maps, and if the Commissioners do not act by this deadline, assume jurisdiction, appoint a special master, and draw constitutionally compliant congressional districts." Am. Compl. Prayer for Relief at 19, ECF No. 7.

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[1] *See* "MI Redistricting Public Comment Portal," Michigan Independent Citizens Redistricting Commission ("MICRC"), https://www.michigan-mapping.org/ (last visited Jan. 30, 2022).
[2] "Final Maps," MICRC, https://www.michigan.gov/micrc/0,10083,7-418-107190_108607---,00.html (last visited Jan. 30, 2022).
[3] *See* MICRC Proposed Meeting Minutes of December 28, 2021 at 5–6, available at https://www.michigan.gov/documents/micrc/MICRC_Proposed_Meeting_Minutes_2021_12_28_745307_7.pdf (noting that two Democratic commissioners, two Republican commissioners, and four independent commissioners voted to adopt the Chestnut map).

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may make a motion to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Although a court considering a Rule 12(b)(6) motion presumes that all well-pleaded material allegations in the complaint are true, "it is still necessary that the complaint contain more than bare assertions or legal conclusions." *Total Benefits Plan. Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (holding that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do").

ARGUMENT

Count II of the Amended Complaint seeks to manufacture a federal claim out of a purported violation of state law, and therefore must be dismissed. In Count II, Plaintiffs allege that the Commission's congressional map violates their Fourteenth Amendment rights under the Equal Protection Clause based on the Commission's alleged "inconsistent and arbitrary" implementation of the redistricting criteria set forth in the Michigan Constitution. Am. Compl. ¶¶ 67, 103,108, 112. The federal right upon which Plaintiffs purport to base their claim, however, simply does not exist.

A. Under Count II, Plaintiffs fail to allege a federal claim.

Plaintiffs allege that "[b]ecause the Commissioners arbitrarily applied Michigan's constitutional requirements, the Commissioners imposed U.S. Constitutional injuries on Michigan's voters." *Id.* ¶ 106. But there is no legal basis for the proposition that an alleged

violation of a state constitutional provision is sufficient to allege a *de facto* violation of the federal Equal Protection Clause.

To the contrary, as the U.S. Supreme Court explained decades ago in *Pennhurst State School & Hospital v. Halderman*, "the principles of federalism that underlie the Eleventh Amendment" prohibit a federal court from granting "relief against state officials on the basis of state law, whether prospective or retroactive." 465 U.S. 89, 106 (1984); *see also Ernst v. Rising*, 427 F.3d 351, 368 (6th Cir. 2005) (citing *Pennhurst*, 465 U.S. at 106) (holding that "the States' constitutional immunity from suit prohibits all state-law claims filed against a State in federal court, whether those claims are monetary or injunctive in nature"); *In re Ohio Execution Protocol Litig.*, 709 F. App'x 779, 782 (6th Cir. 2017) (holding that "a federal court may issue prospective injunctive and declaratory relief compelling a state official to comply with federal law . . . . [b]ut that exception does not extend to prospective injunctive or declaratory relief based on alleged violations of state law").

Here, Plaintiffs ask this Court to enter relief based on alleged violations of state law, in violation of the *Pennhurst* doctrine. Plaintiffs' claim under Count II rests entirely on the Commission's alleged failure to comply with the redistricting criteria mandated under the state constitution. Plaintiffs complain that "the Commissioners ignored roughly half the criteria listed in the Michigan Constitution," Am. Compl. ¶ 122, and that "[t]o the extent the Commissioners (im)properly applied any criteria, they did so out of the order of priority mandated by the Michigan Constitution," *id.* ¶ 123. From this Plaintiffs conclude that "[t]hus, when the Commissioners arbitrarily and inconsistently *applied their state constitutional requirements* of keeping counties and townships whole and maintaining communities of interest, they violated the Equal Protection Clause." *Id.* ¶ 121 (emphasis added). In other words, Plaintiffs allege that the Commission's

alleged violation of the state constitution triggers—and is synonymous with—a violation of the U.S. Constitution.

Plaintiffs' attempt to invent a new right under the Fourteenth Amendment is illustrated by their failure to cite a single precedent for such a claim. In the redistricting context, federal courts have recognized two types of claims under the Equal Protection Clause: claims that state legislative districts substantially deviate from equal population requirements, *Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (holding "as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis"), and racial gerrymandering claims based on the unjustified predominance of racial considerations in drawing district lines, *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). Although Plaintiffs make no allegations to support either claim, they borrow from—and misconstrue—caselaw applicable to these claims to suggest they have a Fourteenth Amendment right to compliance with traditional districting criteria. For instance, in alleging that the federal Equal Protection Clause requires state actors to adhere to Plaintiffs' proposed "traditional redistricting criteria," Am. Compl. ¶¶ 101, 105–06, Plaintiffs cite *Karcher v. Daggett*, 462 U.S. 725, 740 (1983), which stands for the idea that minor population deviations can be *justified* by traditional redistricting criteria. *Id.* ¶ 49. Plaintiffs also cite *Bush v. Vera*, 517 U.S. 952, 979 (1996), which discussed non-compliance with traditional redistricting criteria as evidence of racial gerrymandering, not a standalone claim. *Id.* ¶ 80. Plaintiffs' citation to *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986), is even more far afield; *Gingles* addresses claims under Section 2 of the Voting Rights Act, not the Equal Protection Clause. Under no reading do any of these cases

affirmatively *require* states to comply with "traditional redistricting criteria," much less with Plaintiffs' selective view of what such criteria include.

Because Plaintiffs' claims rest entirely on their misconception that a federal court can order state officials to comply with state law, they cannot succeed on Count II.

B. Even if Plaintiffs had stated a cognizable federal claim, Count II fails to state a claim that the Commission violated the Michigan Constitution.

Even if Plaintiffs' state law claim could trigger federal jurisdiction, it fails on its own terms. Under Count II, Plaintiffs allege that the Commission failed to preserve "communities of interest" by splitting political boundaries (*i.e.* counties, cities, and townships), and therefore "arbitrarily and inconsistently applied the phrase 'communities of interest'" in violation of the Equal Protection Clause. *Id.* ¶¶ 117-121.

But the Michigan Constitution makes clear that, under Michigan law, "communities of interest" are distinct from political boundaries, and that the Commission must prioritize the former over the latter. *See* Mich. Const. Art. IV, § 6(13) (listing criteria "in order of priority," with respect for "communities of interest" listed before "consideration of county, city, and township boundaries").

Accepting Plaintiffs' allegations as true, the Commission simply applied the criteria laid out by the Michigan Constitution in the correct order of priority. Plaintiffs' contention that the Commission "appear[s] to have used a wholly novel definition" of "communities of interest" by not equating the term with "counties, cities, and townships," Am. Compl. ¶¶116-17, takes issue not with the Commission or the congressional map, but with the Michigan Constitution itself. While Plaintiffs might prefer, as a policy matter, that the Michigan Constitution require the

Commission to consider geographic boundaries as "true communities of interest," *id.* ¶ 116, it simply does not do so.[4]

Accordingly, there is nothing "inconsistent or arbitrary" about the Commission's implementation of the criteria set forth in the state constitution; Plaintiffs allege nothing more than that the Commission followed the Michigan Constitution as it is written. Because Plaintiffs have failed to sufficiently allege a violation of the Michigan Constitution, their purported federal claim that hinges on such a violation also fails.

CONCLUSION

For the foregoing reasons, Proposed Intervenor-Defendants respectfully request that the Court dismiss Count II of Plaintiffs' First Amended Complaint.

Date: February 2, 2022

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[4] Plaintiffs also allege that "the Chestnut Plan cannot be described as 'compact' under any reasonable interpretation of that term." Am. Compl. ¶ 73. While this appears to relate to Plaintiffs' Count I, Am. Compl. ¶ 75 ("this lack of compactness is evidence that the Commissioners did not act in a good faith effort to achieve population equality"), to the extent that non-compactness forms a basis for Plaintiffs' Equal Protection claim, it also must fail, as compactness is the lowest-order priority under the Michigan Constitution. *See* Mich. Const. Art. IV, §6(13).

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CERTIFICATE OF SERVICE

Sarah S. Prescott certifies that on the 2nd of February, 2022, she served a copy of the above document in this matter on all counsel of record and parties via the ECF system.

Date: February 2, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(b)(ii), counsel for Proposed Intervenors certify that this brief contains 2,424 words, as indicated by Microsoft Word 2021, inclusive of any headings, footnotes, citations and quotations, and exclusive of the caption, cover sheets, table of contents, table of authorities, signature block, any certificate, and any accompanying documents.

Date: February 2, 2022

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