No. 22-92

IN THE

Supreme Court of the United States

MICHAEL BANERIAN, *et al.*,

Appellants,

v.

JOCELYN BENSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE OF MICHIGAN, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Michigan

MOTION TO AFFIRM

Andrea L. Hansen
Andrew M. Pauwels
HONIGMAN LLP
222 N. Washington Square, Ste. 400
Lansing, MI 48933
(517) 484-8282

Paul M. Smith
Counsel of Record
Mark P. Gaber
Jonathan M. Diaz
Aseem Mulji
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Ste. 400
Washington, DC 20005
(202) 736-2200
psmith@campaignlegal.org

Counsel for Intervenor-Appellee Voters Not Politicians

September 30, 2022

QUESTIONS PRESENTED

1. Did the three-judge district err in concluding that Appellants' malapportionment challenge to small population deviations in Michigan's congressional districting plan lacks a strong likelihood of success on the merits?

2. Did the three-judge district court abuse its discretion in denying Appellants' request for preliminary relief?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Intervenor-Appellee Voters Not Politicians states that it has no parent corporation and no publicly held corporation holds 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Statutory Provisions:

Other Materials:

INTRODUCTION

In 2018, the people of Michigan overwhelmingly approved a constitutional amendment sponsored by Intervenor-Appellee Voters Not Politicians creating an independent redistricting commission. The amendment eliminated the influence of self-interested politicians and instead placed the power to draw lines in the hands of thirteen Michigan citizens—selected at random—from across the political spectrum. The amendment required a robust public input process, prohibited partisan gerrymandering, and required careful attention to communities of interest.

That groundbreaking reform resulted in one of the most transparent and responsive redistricting processes in history, yielding a congressional map drawn with the primary goal of responding to as many public comments regarding communities of interest as feasible—a map that achieved support from all corners of the political spectrum among the commissioners. It is a model for the rest of the country.

Unhappy with that outcome, Appellants filed suit in federal court, seeking to create a federal cause of action from their disagreement with how the Commission applied the state law redistricting priorities and alleging that the 0.14% overall population deviation violates the federal Constitution. The district court properly dismissed the first claim and did not err in denying a preliminary injunction regarding the second. Appellants have offered no argument to show how the district court erred as

matter of law or clearly erred in its factual determinations. The Court should summarily affirm the decision of the district court.

STATEMENT OF THE CASE

1. In 2018, Michigan's voters approved—by a wide margin[1]—a constitutional amendment establishing an independent redistricting commission sponsored by Intervenor-Appellee Voters Not Politicians. App. 240a. The Commission consists of thirteen randomly selected registered voters, including four who identify as Democrats, four who identify as Republicans, and five who identify as unaffiliated with either major political party. Mich. Const. art. IV, § 6. The amendment ensured a robust recruitment effort so that all areas of the state would be represented among the applicants. *Id.* § 6(2). This cycle, more than 9,000 Michiganders applied to serve as commissioners.[2] The amendment prohibited those with conflicts of interest related to redistricting—*e.g.*, candidates, legislators, lobbyists, and their close family members—from serving on the Commission. *Id.* § 6(1)(b)-(c).

After the thirteen commissioners were selected, the Commission was required to hold ten public

[1] *2018 Michigan Election Results*, Mich. Sec'y of State (Nov. 26, 2018), https://mielections.us/election/results/2018GEN_CENR.html (reporting 61.28% approval for State Proposal 18-2: Voters Not Politicians).

[2] *Who applied?*, Mich. Indep. Redistricting Comm'n, https://www.michigan.gov/micrc/-/media/Project/Websites/MiCRC/MISC1/Whos-applying.jpg?rev=0787ca5af1e94068a2d2b5c60d5db29e&hash=0B8D9CCD7F614A2695A1914820954F96 (last visited Sept. 22, 2022).

hearings throughout the state prior to drafting any redistricting plan proposals. *Id.* § 6(8). At least five additional public hearings about the proposed plans were required, *id.* § 6(9), and the commissioners were prohibited from discussing redistricting matters outside the context of public hearings. *Id.* § 6(11). The amendment established redistricting criteria, including complying with federal law, geographic contiguity, respecting communities of interest—including "populations that share cultural or historical characteristics or economic interests," avoiding maps with a disproportionate advantage to any political party, rejecting incumbent protection, adherence to political subdivision boundaries, and reasonable compactness. *Id.* § 6(13).

The amendment's voting system ensures that the plans ultimately selected by the Commission have broad support. To be adopted, a plan must have majority support—including by receiving the votes of at least two commissioners from each group—Democratic, Republican, and unaffiliated. *Id.* § 6(14)(c).

2. Before drawing any plans, the Commission held sixteen public hearings across Michigan. App. 241a. After the drawing began, more than 120 additional public hearings were held. App. 241a. The Commission took public testimony and amassed a record of thousands of pages. App. 241a. Five proposed congressional plans drafted by commissioners were considered, and the Commission ultimately adopted the "Chestnut Plan" proposed by Commissioner Anthony Eid by an 8-5 vote. App. 241a.

Commissioner Eid drew the plan with the purpose of maximally responding to the public comments received by the Commission in order to respect communities of interest. App. 241a. That plan had the smallest overall population deviation of any of the considered plans—a deviation of 0.14% from the ideal distribution. App. 242a.

3. Appellants filed suit, alleging two causes of action: (1) that the plan was malapportioned in violation of the one-person, one-vote principle because of its 0.14% overall population deviation, and (2) that the plan violated the Equal Protection Clause by the manner in which it aimed to comply with the state constitution's requirement that communities of interest be respected. App. 242a. The district court concluded that Appellants' second cause of action—which bootstrapped state law objections into a federal Equal Protection claim—presented a nonjusticiable political question because it "rest[ed] upon the plaintiffs' own notions of political fairness." App. 238a.

Appellants moved for a preliminary injunction on their malapportionment claim, which the district court denied. App. 251a. Applying the legal framework articulated by this Court in *Tennant v. Jefferson County Comm'n*, 567 U.S. 758 (2012) (per curiam) and *Karcher v. Daggett*, 462 U.S. 725, 730 (1983), the district court first concluded that the 0.14% deviation was small—five times smaller than the deviation approved by this Court in *Tennant*. App. 245a. Moreover, the court concluded that the Commission's aim to preserve communities of interest was legitimate and a goal "employed by more than 20

states." App. 246a. In addition, the district court reasoned that the record evidence proved that the Chestnut Plan advanced the Commission's interest in preserving communities of interest, with detailed testimony and supporting public record comments supporting that factual finding. App. 246a. Finally, the court observed that Appellants had not shown any alternative plan that would preserve communities of interest while achieving a lower population deviation. App. 248a. Indeed, Appellants acknowledged their alternative map paid no heed to the Commission's communities-of-interest priorities. Supp. App. 19; App. 248a.[3]

The court weighed the facts in light of the *Karcher-Tennant* framework and concluded that Appellants had not shown a likelihood of success on the merits. App. 250a. Moreover, the court concluded that the public interest weighed in favor of denying a preliminary injunction. App. 251a.

SUMMARY OF ARGUMENT

Appellants failed to carry their burden in the district court to obtain the "extraordinary remedy" they sought. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

The three-judge district court did not err in concluding that Appellants' malapportionment claim lacked a strong likelihood of success on the merits. The U.S. Constitution requires "equal representation for equal numbers of people" in the apportionment of

[3] "Supp. App." in this brief refers to the Supplemental Appendix being submitted with the brief filed by the Commission.

congressional districts. *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). However, the one-person, one-vote principle does not mandate "precise mathematical equality," requiring only that "districts be apportioned to achieve population equality as nearly as practicable." *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Wesberry*, 376 U.S. at 18). A state may justify slight deviations by showing that they are necessary to achieve a legitimate state objective. *Id.* at 730-31. Courts, including this one, have long deferred to state policy decisions when fashioning congressional districts, "so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts." *Karcher*, 462 U.S. at 740.

To that end, this Court has set out a two-part test to determine whether a congressional map satisfies the one-person, one-vote requirement: first, plaintiffs must show that population differences "could practicably be avoided," and if plaintiffs carry that burden, then the state must "show with some specificity that the population differences were necessary to achieve some legitimate state objective." *Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 760 (2012) (internal quotation marks omitted). The state's burden under the second prong is "flexible" and depends on four factors: "[1] the size of the deviations, [2] the importance of the State's interests, [3] the consistency with which the plan as a whole reflects those interests, and [4] the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." *Karcher*, 462 U.S. at 741. "[W]hether deviations are

justified requires case-by-case attention to these factors." *Id.* The district court's denial of the motion for preliminary relief should be affirmed.

First, the district court below correctly applied this standard and found that all four factors weighed in favor of deference to the Commission's decision to adopt a plan with minor population deviations to achieve its legitimate policy objectives. The adopted congressional districting plan's deviation from perfect population equality—a mere 0.14%—is at least five times smaller than the 0.79% deviation this Court deemed "small" in *Tennant*. 567 U.S. at 765.

Second, as the district court correctly concluded, the Commission's goal to preserve communities of interest is among the "undisputedly legitimate" objectives, App. 246a, that can justify minor population deviations "consistent with constitutional norms." *Karcher*, 462 U.S. at 740.

Third, after extensive review of the Commission's record, including hundreds of the public comments submitted by Michiganders, the three-judge court in this case found that the Commission's "comment-driven" process for identifying and considering communities of interest was neutral and systematic, and the plan adopted by the Commission identified specific community-of-interest goals that motivated the composition of each of the state's thirteen congressional districts, and that the plan was "consistent throughout in its emphasis on communities of interest identified in comments." App. 246a-48a.

Fourth, the Commission lacked alternative plans

that would "approximate population equality more closely" while preserving its communities-of-interest goals—and Appellants proposed only one alternative with a lower population deviation, which did not even attempt to achieve the Commission's other constitutionally-mandated objectives. *See Karcher*, 462 U.S. at 741. In summary, the three-judge district court correctly concluded that the Commission's adopted plan's population deviations were necessary to achieve the Commission's community-of-interest goals.

Finally, as the district court observed, the public interest is best served by giving effect to the results of the districting process that Michigan voters overwhelmingly supported at the ballot box in 2018. That process, undertaken by thirteen ordinary Michiganders of varied political views with input from hundreds of their fellow citizens, is perhaps the most transparent in redistricting history, and its results are consistent with the Constitution's requirements.

The district court applied the correct legal test, afforded the Commission appropriate deference, and its factual findings do not come close to the clear error standard. The Court should summarily affirm the district court's denial of preliminary relief.

STANDARD OF REVIEW

The district court's denial of preliminary relief is reviewed for abuse of discretion. Although Appellants omit any discussion of the standard of review governing this Court's consideration of this case, it is central to this appeal. "A preliminary injunction is an extraordinary remedy never awarded as of right."

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24 (2008). A plaintiff is not entitled to a preliminary injunction, and a district court should not order one, "unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, pp. 129–130 (2d ed.1995)).

To obtain this "drastic remedy," *id.*, a plaintiff must "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. In election-related cases, other considerations, like the potential for confusion and disruption to the electoral process, also factor into the analysis. *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

A district court's denial of a preliminary injunction is well within its "equitable discretion" and is reviewed only for an abuse of discretion. *Benisek v. Lamone*, 138 S Ct. 1942, 1943 (2018) (per curiam); *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 664 (2004). This Court may, of course, correct errors of law, but the district court's factual determinations are subject to review only for clear error and afforded substantial deference. *See* Fed. R. Civ. P. 52; *Cooper v. Harris*, 137 S. Ct. 1455, 1464-65 (2017) ("A district court's assessment of a districting plan . . . warrants significant deference on appeal to this Court.").

ARGUMENT

I. The district court did not err in concluding that Appellants' malapportionment claim lacked a strong likelihood of success on the merits.

The district court did not err in concluding that Appellants were unlikely to succeed on their malapportionment claim. Article I, section 2 of the U.S. Constitution "establishes a 'high standard of justice and common sense' for the apportionment of congressional districts: 'equal representation for equal numbers of people.'" *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964)). This one-person, one-vote principle does not, however, mandate "precise mathematical equality" among congressional district populations. *Id.* It requires "only . . . that districts be apportioned to achieve population equality 'as nearly as is practicable.'" *Id.* (quoting *Wesberry*, 376 U.S. at 7-8). In other words, the standard demands not perfection but a "*good-faith effort* to achieve equality"—so slight deviations from absolute equality are allowed if the state can show that the deviations were necessary to achieve a legitimate state objective. *Id.* at 730-31 (emphasis added).

This focus on practicability and good faith makes sense. Perfect mathematical equality, though ideal, "may be impossible to achieve in an imperfect world." *Id.* at 730. And even when achieving absolute equality is *possible*, it may not be practicable. State law often requires map drawers to weigh and evaluate multiple (sometimes competing) goals when fashioning

congressional districts. In keeping with a desire not to "intrude upon state policy any more than necessary," *White v. Weiser*, 412 U.S. 783, 795 (1973) (internal citation omitted), this Court has long committed to "defer to [such] policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts." *Karcher*, 462 U.S. at 740 (citing *White*, 412 U.S. at 795-97).

For similar reasons, this Court has declined to specify a de minimis population variance that would per se satisfy the one-person, one-vote standard. *Id.* at 731-35. One concern, of course, is that picking a specific value would condition states to strive for some arbitrary number other than equality. *Id.* at 731. Another is that a de minimis rule would "excuse population variances without regard to the circumstances of each particular case." *Id.* at 731 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969)). And "[t]he extent to which equality may practicably be achieved may differ from State to State and from district to district." *Kirkpatrick*, 394 U.S. at 530.

This Court thus set out a "two-prong test" to assess whether a congressional map satisfies the one-person, one-vote requirement. *Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 760 (2012) (citing *Karcher*, 462 U.S. at 734). First, the plaintiffs "bear the burden of proving the existence of population differences that 'could practicably be avoided.'" *Id.* (quoting *Karcher*, 462 U.S. at 734). "If they do so, the burden shifts to the State to 'show with some

specificity' that the population differences 'were necessary to achieve some legitimate state objective.'" *Id.* (quoting *Karcher*, 462 U.S. at 741, 740).

The state's burden under the second prong is "flexible" and depends on four factors: "[1] the size of the deviations, [2] the importance of the State's interests, [3] the consistency with which the plan as a whole reflects those interests, and [4] the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." *Karcher*, 462 U.S. at 741. "[W]hether deviations are justified requires case-by-case attention to these factors." *Id.*

Appellants do not—nor could they—contend that the three-judge district court employed the wrong legal standard. *See* App. 244a-45a. Indeed, the court examined each step of the analysis set forth in *Karcher* and *Tennant*, first assuming (to plaintiffs' benefit) that they had satisfied the first prong. App. 245a. The district court then found that each of the four factors above weighed in the Commission's favor, warranting a deferential view of the Commission's justifications for the minor population deviation in the map. App. 245a. And finally, after closely reviewing the evidence, the district court found that plaintiffs lacked a strong likelihood of success on the second prong because the "overwhelming weight of the record" showed the Chestnut Plan's slight population deviations were "necessary to achieve" the Commission's legitimate goal of maintaining communities of interest. App. 250a.

Appellants object to certain factual findings of the

three-judge court, namely that the Chestnut Plan reflects consistent application of the Commission's legitimate goal to preserve communities of interest, and that the Plan's minor population variation was necessary to achieve the goal. Neither objection merits reversal.

A. The Chestnut Plan's deviation from perfect population equality is small.

First, Appellants do not dispute the district court's finding, as to the first factor, that the Chestnut Plan's population deviation of 0.14% is small. App. 245a. As the district court explained, 0.14% is at least five times smaller than the 0.79% deviation this Court deemed "small" in *Tennant*. 567 U.S. at 765. In that case, this Court unanimously reversed the district court's decision enjoining West Virginia's 2012 congressional map because the lower court "had failed to afford appropriate deference" to the state's justifications for such a minor deviation. *Id.* at 759. Because the size of the Chestnut Plan's deviation here is smaller still, "the [Commission's] burden to justify the population deviations is correspondingly light." *Stone v. Hechler*, 782 F. Supp. 1116, 1128 (N.D.W. Va. 1992) (citing *Karcher*, 462 U.S. at 741) (upholding a congressional plan with population deviance of 0.09%).

B. The Commission's interest in preserving communities of interest is legitimate and important.

Second, the three-judge district court correctly concluded that the Commission's goal to preserve communities of interest is among the "undisputedly

legitimate" objectives that can justify minor population deviations. App. 246a.

Legitimate goals that can justify minor population deviations include valid neutral redistricting criteria that are "consistent with constitutional norms." *Karcher*, 462 U.S. at 740-41. "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving cores of prior districts, and avoiding contests between incumbent[s]." *Id*. at 740. This list is "not exclusive." *Tennant*, 567 U.S. at 764.

The Commission's goal to preserve communities of interest is a neutral redistricting criterion well within constitutional norms. Indeed, this Court has repeatedly identified communities-of-interest preservation as among the "traditional redistricting criterion" that are legitimate goals in drawing districts. *See, e.g.*, *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 795 (2017); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433 (2006). And more to the point, in *Abrams v. Johnson*, this Court held that a court-drawn congressional plan's 0.35% population deviation could be justified in part by adherence to traditional redistricting criteria, including "communities of interest." 521 U.S. 74, 99-100 (1997).

The importance of preserving communities of interest is apparent from the fact that at least 20 states, including Michigan, require some attention to

this goal in devising congressional districts.[4] This is because respecting communities of interest is good redistricting policy. When a state strives to identify and keep whole communities that "share common concerns," it helps to ensure that Congress reflects the diverse array of interests in that state and thereby advances the Constitution's fundamental goal of fair and effective representation. *See, e.g.*, *Carstens v. Lamm*, 543 F. Supp. 68, 91 (D. Colo. 1982) ("[A] plan which provides fair and effective representation . . . must identify and respect the most important communities of interest in the state."). In Michigan, the state constitution requires the Commission to consider "the state's diverse population and communities of interest" as one of several districting criteria, following, in priority order, compliance with federal law (*i.e.*, the one-person, one-vote rule and the Voting Rights Act) and contiguity. Mich. Const. art. IV, § 6(13)(c). The state constitution defines communities of interest as "populations that share cultural or historical characteristics or economic interests." *Id.*

This communities-of-interest criterion holds special importance in Michigan's unique system of congressional redistricting, not only because it takes priority over most other criteria, *see id.*, but also because of its relationship to the extensive public input and participation that must be solicited during the process. The Michigan Constitution requires that

---

[4] *See Redistricting Criteria*, Nat'l Conf. State Legislatures (July 16, 2021), https://www.ncsl.org/research/redistricting/redistricting-criteria.aspx.

the Commission hold at least 10 public hearings throughout the state to gather input on potential plans before drafting any maps. *Id.* § 6(8). After developing proposed plans, the Commission must solicit public comment at another five hearings throughout the state. *Id.* § 6(9). And before voting to adopt a plan, the Commission must provide another 45 days for public comment. *Id.* § 6(14)(b). No Commission business can occur outside of open meetings, and all hearings must be conducted "in a manner that invites wide public participation throughout the state." *Id.* § 6(10). Unsurprisingly, the district court found that the Commission received thousands of public comments solicited at more than 135 meetings, which it used to identify and prioritize communities of interest to keep whole. *See* App. 241a; 247a (finding that Michigan conducted a "comment-driven redistricting process").

Contrary to the foregoing authority establishing the importance of communities-of-interest criteria in Michigan and elsewhere, Appellants appear to contend that no communities-of-interest criterion can, as a matter of law, justify population variation because courts are unable to ascertain whether the criterion has been applied consistently. This argument defies relevant precedent and common sense.

As an initial matter, this Court has already held that preserving communities of interest is among the valid, neutral policies that can justify minor population deviations. *See Abrams*, 521 U.S. at 99-100. This is in accordance with the Court's express

command in *Karcher* to keep the field of possible justifications open and flexible. *See* 462 U.S. at 740.

The only legal authorities Appellants cite on this point are two lower court decisions—one unreported, and neither groundbreaking. In *Favors v. Cuomo*, the three judge-district court reviewing New York's 2010 court-drawn congressional plan noted that communities-of-interest choices are less "evident on a map" and more subject to political judgment but did not suggest they are unascertainable. To the contrary, the court acknowledged its ability to verify that the court-drawn plan had achieved its limited goal to respect "certain widely recognized, geographically defined communities." No. 11-CV-5632, 2012 WL 928223, at *5 (E.D.N.Y. 2012). The three-judge court in *Bethune-Hill v. Virginia State Board of Elections* explained, while evaluating a racial gerrymandering claim, that the boundaries of a community of interest may be more or less discernable depending on how concretely and objectively communities are defined and identified. *Bethune-Hill v. Virginia State Bd. of Elections*, 141 F. Supp. 3d 505, 539 (E.D. Va. 2015), *vacated and affirmed in part*, 580 U.S. 178 (nonetheless affirming that preservation of communities of interest is a neutral traditional redistricting criterion).

Furthermore, communities-of-interest criteria are not, as Appellants claim, "inherently susceptible to inconsistent application." To be sure, communities-of-interest criteria (like other redistricting criteria) *can* be defined and applied in a way that is unclear, inconsistent, or discriminatory, but they can also be

applied clearly, systematically, and fairly. Courts are well equipped to tell the difference based on an evidentiary record that includes information about how the map drawer defined and considered communities of interest. Indeed, the three-judge court in this case was able to do just that, based on evidence regarding the Commission's use of public comments to systematically identify and prioritize communities of interest. *See infra*. The evidence used to evaluate a map drawer's application of communities-of-interest criteria may be less quantitative than evidence used to assess other redistricting criteria (*e.g.*, compactness), but this does not render communities-of-interest determinations inherently unascertainable.

Respecting communities of interest is not unlike the other neutral criteria that this Court has held may legitimately justify minor population deviations. Consider, for example, the interest in preserving district cores. *See Karcher*, 462 U.S. at 740. What qualifies as the core of a prior district? How is a district's core identified? Given shifting populations, how did the legislative map drawer identify which district cores to preserve? The fact that these questions may demand answers that are within the map drawer's knowledge and discretion does not disable a court from accessing this information (through testimony, for example) and reasonably ascertaining whether the interest was applied consistently and justifies minor population deviations.

In sum, Appellants' objections to considering

communities of interest a legitimate state objective in one-person, one-vote claims fails. The district court's determination on the second factor was not in error.

C. The district court did not clearly err in finding that the Chestnut Plan consistently reflects the Commission's communities-of-interest goals.

As to the third factor, the district court did not clearly err in finding that the Commission consistently applied its communities-of-interest criterion and that the Chestnut Plan consistently reflects this goal. *See* App. 246a; *Karcher*, 462 U.S. at 741.

The Commission's "comment-driven" process for identifying and considering communities of interest was neutral and systematic. App. 247a-48a. As the district court found, the Commission identified and defined communities of interest based on the weight of public comments submitted to the Commission during the redistricting process. App. 241a, 243a. In accordance with its obligations under the Michigan Constitution, the Commission held sixteen public hearings around the state before drawing any congressional maps to collect such input, and "upward of 120 . . . more" while drafting maps. App. 241a. During this time, Michigan residents from across the state could also submit comments identifying communities of interest on the Commission's online public comment portal, which included a feature that enabled commenters to draw a geographic boundary for the community in question and provide a narrative

description. App. 151a, ¶ 7.[5]

Before drawing congressional maps, the Commission hired the MGGG Redistricting Lab to produce a report summarizing community-of-interest information in public comments received between March and August of 2021. *See* ECF 61-10, PageID.1796. The report included a description of community-of-interest "clusters" that emerged from grouping similar public comments, a link to those submissions, and a heat map indicating the geographic area of the identified community. *See, e.g.*, ECF 61-10, PageID.1798. The report was intended to provide commissioners an easy-to-reference synthesis of the communities identified by the Michigan public while drawing maps.

The Commission relied on this report and the underlying public commentary to identify communities of interest while drawing and editing congressional plans. Commissioner Eid attested to using the community-of-interest heat maps to draft the Chestnut Plan, App. 140a, ¶ 4, and referred to community-of-interest clusters repeatedly in discussing the Chestnut Plan with his fellow commissioners. *See* ECF 61-11, PageID.1968-79.

In reviewing Commissioner Eid's declaration in this case, the district court found that he had identified specific communities-of-interest goals that motivated each of the state's thirteen districts in the

[5] *See Redistricting Public Comment Portal*, Mich. Indep. Redistricting Comm'n, https://www.michigan-mapping.org (last visited Sept. 22, 2022).

Chestnut Plan. App. 246a; *see also* App. 140a-48a, ¶¶ 5-28. The court acknowledged that the Chestnut Plan could not preserve *every* community of interest and necessarily reflected tradeoffs, but found that the Commission reasonably prioritized preserving communities of interest in every region of the state based on the weight of comments behind them. App. 247a (noting that "in different districts, different types of communities might predominate"). Thus, the court found that the Chestnut Plan was "consistent throughout in its emphasis on communities of interest[] identified in comments." App. 247a-48a. The record strongly supports this finding, and Appellants do not identify how the district court's conclusion in this regard was the product of clear error.

D. The district court did not clearly err in finding that the Commission lacked alternative plans that would balance population more closely while preserving its interests.

Fourth, the district court did not clearly err in finding that the Commission lacked alternative plans that would "approximate population equality more closely" while preserving its communities-of-interest goals. *Karcher*, 462 U.S. at 741. In addition to the Chestnut Plan, the Commission drafted and published for notice and comment four other plans (the Apple, Birch, Lange, and Szetela Plans). ECF 61-11, PageID.1992. Each of these alternatives had substantially larger population deviations, ranging from 0.22% to 0.48%. *Id.*

Plaintiffs, for their part, offered only one

alternative plan at the time they filed suit. Though their plan had a lower population deviation, it bore very little resemblance to the Commission's enacted plan. *See* App. 157a, 175a-89a. In his declaration, Commissioner Eid noted significant departures in this alternative plan from the Commission's specific community-of-interest goals for eleven out of thirteen districts. App. 141a-48a, ¶¶ 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27. Commissioner Eid went on to attest, and the district court agreed, that the Plaintiffs' alternative plan made no effort whatsoever to achieve the Commission's communities-of-interest goals. App. 148a, ¶ 32; App. 248a. Indeed, at oral argument, counsel for Appellants acknowledged that their alternative plan was submitted in connection with the legal claim the district court dismissed (which is not the subject of this appeal), and not in support of their malapportionment claim. *See* Supp. App. 48. The district court therefore correctly found that the fourth and final factor in the *Karcher* analysis, like the others, favored deference to the Commission's legitimate communities-of-interest objectives.

E. The district court did not err in finding that the Chestnut Plan's small deviation was necessary to achieve the Commission's communities-of-interest goals.

The district court did not err in finding that the plan's small population deviation was necessary to achieve the Commission's communities-of-interest goals. Under *Karcher* and *Tennant*, the state must "show with some specificity" that the population

differences "were necessary to achieve some legitimate state objective." *Karcher*, 462 U.S. at 740-41. The state cannot "simply rely[] on general assertions," but the required weight and specificity of the state's showing ultimately depends on the court's analysis of the four factors discussed above. *Id.* at 741. The state bears a lighter burden (and a court is thus more willing to defer) when the deviations are small; the state's interests are important and consistently applied across the plan as a whole; and the state lacked alternatives that could achieve those interests with lower population deviation. *See Tennant*, 567 U.S. at 760, 765.

In *Tennant*, this Court unanimously reversed a three-judge district court where it "failed to afford appropriate deference to West Virginia's reasonable exercise of its political judgment." 567 U.S. at 759. There, West Virginia argued that its minor 0.79% deviation was necessary to keep counties whole, avoid pairing incumbents, and retain prior district cores. *Id.* at 761-62, 764. The Court faulted the district court for questioning these legitimate objectives "given the small 'size of the deviations'" and the apparent consistency with which the state's plan reflected its desire to preserve cores and keep counties whole. *Id.* at 765.

Here, having found that the Chestnut Plan's even smaller deviations resulted from adherence to similarly important state interests that were meticulously and systematically applied across the whole plan with no better alternatives, the district court appropriately concluded that Commission was

entitled to at least the same level of deference applied in *Tennant*. App. 249a.

That said, the district court did not really defer in practice. The court closely examined Commissioner Eid's declaration, finding that it had "specifically identified the communities of interest that it sought to maintain in each district." App. 249a. And although the declaration was sufficient evidence of the Commission's goals, the district court directed the parties to produce further record evidence supporting or refuting Commissioner Eid's representations, including every single public comment that identified the communities that the Commission sought to preserve in each district. App. 243a. The Commission produced a 787-page appendix that includes 546 such comments, as well as several legislative record documents and meeting transcripts showing how the Commission defined communities of interest and used communities-of-interest data in real time to draft and consider the Chestnut Plan. *See* ECF 61, PageID.1161 (identifying parts of the record).

The Commission's robust record stands in contrast to the records found lacking in *Karcher* and *Kirkpatrick*. In *Karcher*, the New Jersey legislature failed to justify a 0.698% population deviation based on its stated desire to protect minority voting strength. 462 U.S. at 742. New Jersey offered evidence of its desire to advance this goal in just a single district, and the record was "silent" as to why preserving minority voting strength in that district required population deviations in far-away districts. *Id.* at 743. By contrast, the Commission provided the

district court testimonial and documentary evidence explaining how it defined communities of interest based on the weight of public comments and explained with specificity how those comments led it to prioritize certain communities in every district that had slight population deviations. The Commission's record is also plainly better than Missouri's in *Kirkpatrick*, where the state "made 'no attempt' to account for the same factors in all districts" to explain its whopping 5.97% deviation, and "generally failed to document its findings thoroughly and apply them 'throughout the State in a systematic, not an *ad hoc* manner.'" *Karcher*, 462 U.S. at 741, 767 (quoting *Kirkpatrick*, 394 U.S. at 535).

The district court did not shy away from this record. The court scrutinized every single public comment submitted by the Commission and found that the weight of the comments in the legislative record largely corroborate the communities-of-interest goals identified in Commissioner Eid's declaration. App. 250a. In eight districts where the Plaintiffs disputed the Commission's determinations about which communities to prioritize, the district court likewise found that the lion's share of public input supported those determinations. App. 250a.

Based on "the overwhelming weight of the record" before it, the district court reasonably concluded that the Chestnut Plan's population deviations were necessary to achieve the Commission's community-of-interest goals. App. 250a. To the extent Appellants dispute this conclusion, they point to no evidence in the record showing that the district court's factual

findings or evaluation of the record at this early stage of litigation were clearly erroneous. *Easley v. Cromartie*, 532 U.S. 234, 259 (2001) (Thomas, J., dissenting) ("Where there are two permissible views of the evidence, the factfinders choice between them cannot be clearly erroneous.") (citation omitted). On this record, the district court did not abuse its discretion in denying interlocutory relief for the Plaintiffs' failure to show a strong likelihood of success on the merits.

II. The equities support the district court's denial of a preliminary injunction.

Consideration of the equities supports the district court's denial of a preliminary injunction. As the district court observed, the public interest supports the use of the Chestnut Plan. App. 251a. The people of Michigan overwhelmingly supported the constitutional amendment proposed by Voters Not Politicians entrusting an independent citizen's commission with redrawing congressional lines. Thirteen ordinary Michiganders of all political views then embarked on perhaps the most transparent process in redistricting history, with districts drawn in direct response to public input. The public interest is served by giving effect to the results of that process.

This is particularly so when weighed against the exceedingly minor population deviation to which Appellants object. Indeed, the deviation is so small that, in reality, the mere passage of time since the Census was conducted in 2020 all but guarantees that a map with zero population deviation would be at least as unbalanced today. The balancing of the equities

tilts decidedly against Appellants.

* * *

The Court should summarily affirm the district court's denial of preliminary relief. There is no question that the district court applied the correct legal test and its factual findings do not come close to the clear error standard. The phrase "don't make a federal case out of it" seems tailor-made for this lawsuit.

CONCLUSION

For the foregoing reasons, the district court's decision should be summarily affirmed.

September 30, 2022

Respectfully submitted,

Paul M. Smith
Counsel of Record
Mark P. Gaber
Jonathan M. Diaz
Aseem Mulji
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Ste. 400
Washington, DC 20005
(202) 736-2200
psmith@campaignlegal.org

Andrew M. Pauwels
Andrea L. Hansen
HONIGMAN LLP
222 N. Washington
Square, Ste. 400

Lansing, MI 48933
(517) 484-8282

Counsel for Intervenor-Appellee Voters Not Politicians