UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL BANERIAN, et al.,

Plaintiffs,

v.

JOCELYN BENSON, et al.,

Defendants,

and JOAN SWARTZ MCKAY, et al.,

Intervenor-Defendants.

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

DEFENDANTS' PARTIAL MOTION TO DISMISS

Defendants Douglas Clark, Juanita Curry, Anthony Eid, Rhonda Lange, Steven Terry Lett, Brittni Kellom, Cynthia Orton, M.C. Rothhorn, Rebecca Szetela, Janice Vallette, Erin Wagner, Richard Weiss, and Dustin Witjes (collectively "The Commission") move this Court to dismiss Count II of Plaintiff's Amended complaint under Fed. R. Civ. P. 12(b)(1) and (6). Dismissal is necessary under Rule 12(b)(1) because the Eleventh Amendment bars this Court's jurisdiction over Count II. Dismissal is also necessary under Rule 12(b)(6) because Count II's factual allegations are insufficient to state a federal claim.

The Commission, for the reasons explained in its accompanying brief, respectfully requests that this Court dismiss Count II of the Plaintiff's Amended Complaint.

Dated: February 18, 2022

Respectfully submitted,

/s/ David H. Fink

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DEFENDANTS' BRIEF IN SUPPORT OF PARTIAL MOTION TO DISMISS

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INTRODUCTION

With Count II of their complaint, the Plaintiffs are attempting to bring a state-law claim into federal court. Under Fed. R. Civ. P. 12(b)(1), Count II should be dismissed because the Eleventh Amendment divests federal courts of jurisdiction to direct state officials to obey state law. Further, Count II should be dismissed under Fed. R. Civ. P. 12(b)(6) because the Equal Protection Clause does not mandate the redistricting criteria Plaintiffs contend are judicially enforceable. Further, Plaintiffs interpretation of the Michigan Constitution is, in all events, patently incorrect and would fail even in a court with jurisdiction to decide this cause of action. The Court therefore should dismiss Count II.[1]

BACKGROUND

The following relevant facts are taken from the operative pleading, ECF 7, (the Complaint) and are taken as true for purposes of this motion only.

In November 2018, the Michigan voting public amended the Michigan Constitution to establish the Michigan Independent Citizens Redistricting Commission (the Commission), a citizen-comprised branch of the Michigan government vested with exclusive authority to adopt district boundaries for congressional elections after each decennial census. Compl. ¶ 45; Mich. Const. art. IV, § 6(1). Article 4, Section 6 of the Michigan Constitution mandates a balanced, bi-partisan body of Commissioners lacking prior political experience, Mich. Const., art. IV, § 6(1), and requires that all members of the public have the opportunity to provide

[1] The Commission's arguments below are materially identical to the arguments provided in Argument Section I.A of the Commission's Opposition to Plaintiffs' Motion for a Preliminary Injunction. The office of the clerk of court instructed counsel for the Commission to file a separate brief in support of their motion to dismiss rather than consolidate their positions on both motions in a single brief, as the Commission's counsel proposed. Therefore, the Commission repeats its arguments here, even though they are largely identical.

input throughout the map-drawing process. First, before drafting even begins, the Commission must "hold at least ten public hearings throughout the state for the purpose of … soliciting information from the public about potential plans." *Id.* art. IV, § 6(8). Second, after drafting a set of plans, the Commission must again "hold at least five public hearings throughout the state for the purpose of soliciting comment from the public about the proposed plans." *Id.* art. IV, § 6(9). Third, before voting on a final plan the Commission must "provide public notice of each plan that will be voted on and provide at least 45 days for public comment on the proposed plan or plans." *Id.* art. IV, § 6(14)(b). The Michigan Constitution also requires that the Commission "conduct all of its business at open meetings, that it "conduct its hearings in a manner that invites wide public participation throughout the state," that it "use technology to provide contemporaneous public observation and meaningful public participation in the redistricting process during all meetings and hearings," and that it "shall keep a record of all proceedings…." *Id.* art. IV, § 6(10) and (17).

Subsection 13 of Article 4, Section 6 provides a list of criteria the Commission must utilize in descending "order of priority." *Id.* art. IV, § 6(13); Compl. ¶ 47. Third on the list is the following criterion:

> 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.

Mich. Const. art. IV, § 6(13)(c); Compl. ¶ 47. That criterion is separate from, and ranked ahead of, another criterion providing that "[d]istricts shall reflect consideration of county, city, and township boundaries." *Id.* art. IV, § 6(13)(f). Plaintiffs allege that "[t]he criteria enumerated in the Michigan Constitution track the traditional (and traditionally accepted)

redistricting criteria used in several jurisdictions across the Nation," Compl. ¶ 48, and that these criteria "serve as means to prevent unconstitutional gerrymandering and ensure compliance with federal law," *id.* ¶ 50.

The Commission convened for its inaugural session in September 2020. Compl. ¶ 51. On December 28, 2021, the Commission adopted and enacted a congressional districting plan known as the Chestnut plan. Compl. ¶ 56. The Complaint alleges, inter alia, that the Chestnut plan splits at least fifteen of Michigan's 83 counties, that "parts of Oakland County are located in six separate congressional districts," that the Chestnut plan "cannot be described as 'compact' under any reasonable interpretation of the term," that one district (District 5) "touches Michigan's Eastern *and* Western border," and that the Commission otherwise "failed to abide by the constitutionally imposed traditional redistricting criteria," which (they allege) "inflicts constitutional harms on Plaintiffs." Compl. ¶¶ 64, 65, 73, 80. Plaintiffs contend that an alternative plan appended to their Complaint better adheres to traditional districting criteria. *See, e.g. id.* ¶ 80. Plaintiffs also allege that the total population between the Chestnut plan's largest and smallest districts is 1,122 persons or 0.14%. Compl. ¶¶ 90–91.

The Complaint contains two counts. Count I asserts a violation of the equal-population rule of Article I, Section 2 of the U.S. Constitution. *Id.* ¶¶ 84–89. The claims is without merit, but the Commission does not move to dismiss it at this time and is filing an answer contemporaneous with this motion. Count II alleges that "[a] Fourteenth Amendment Equal Protection violation arises when a legislature or commission implements traditional redistricting criteria in an inconsistent and arbitrary manner," *id.* ¶ 103, and that the Chestnut plan fails this test because "the Commissioners arbitrarily applied Michigan's constitutional requirements," *id.* ¶ 106. Count II proceeds to detail the Michigan constitutional criteria and

allege violations of those criteria. *Id.* ¶¶ 107–26. The Commission now moves to dismiss Count II.

THE LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(1) permits parties to bring a motion to dismiss for "lack of subject-matter jurisdiction," and Rule 12(b)(6) permits parties to bring a motion to dismiss for "failure to state a claim upon which relief can be granted." Under Rule 12(b)(1), "because at issue . . .is the trial's court jurisdiction . . . . no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist." *Peterson v. City of Grand Rapids*, 182 F. Supp. 3d 750, 753 (W.D. Mich. 2016) (quoting *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996)). The standard under Rule 12(b)(6) requires that "the pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (cleaned up). "Although a complaint is to be liberally construed, it is still necessary that the complaint contain more than bare assertions or legal conclusions. All factual allegations in the complaint must be presumed to be true, and reasonable inferences must be made in favor of the non-moving party." *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield,* 552 F.3d 430, 343 (6th Cir. 2008).

ARGUMENT

I. The Eleventh Amendment Bars This State-Law Claim

This Court lacks jurisdiction to order the Commission to comply with "the Michigan constitutional criteria." Compl. ¶ 108. "Case law is legion that the Eleventh Amendment to

the United States Constitution directly prohibits federal courts from ordering state officials to conform their conduct to state law." *Johns v. Supreme Ct. of Ohio*, 753 F.2d 524, 526 (6th Cir. 1985). Because the rationale of the *Ex Parte Young* sovereign-immunity exception is "wholly absent . . . when a plaintiff alleges that a state official has violated *state* law," the Supreme Court held in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), that such suits are jurisdictionally barred. *Id.* at 106. There is no election-lawsuit exception. *See, e.g.*, *Ohio ex rel. Skaggs v. Brunner*, 549 F.3d 468, 471 (6th Cir. 2008); *Ala. Legis. Black Caucus v. Alabama*, 988 F. Supp. 2d 1285, 1304 (M.D. Ala. 2013) (three-judge court) (per Pryor, J.).

Count II contravenes this doctrine. *See Pennhurst*, 465 U.S. at 121 ("A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment."). To begin, there can be no doubt that Plaintiffs' suit is against the State. The suit names each commissioner "solely" in that commissioner's "official capacity" and the Secretary of State "solely in her official capacity." Compl. ¶¶ 29, 32–44. The Defendants share the State's immunity under the doctrine that "a suit against a state official in his or her official capacity . . . is no different from a suit against the State itself." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).[2] The Commission exercises "legislative functions" as a department of the Michigan government. Mich. Const. art. IV, § 6(22). Because the Commission "is a state agency, and suits against officials in their official capacities are suits against the state," sovereign immunity applies. *Koch v. Dep't of Nat. Res.*, 858 F. App'x

[2] Thus, there is no legal significance to the Complaint's assertion that the Commission is a "[n]on-party." Compl. ¶ 30. Because "[o]fficial-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent,' . . . an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985) (citations omitted).

832, 835 (6th Cir.), *cert. denied*, 142 S. Ct. 241 (2021). The Secretary of State enjoys the same immunity. *See, e.g.*, *Malnes v. Arizona*, 705 F. App'x 499, 500 (9th Cir. 2017).

Nor can there be any serious doubt that Count II alleges violations of Michigan law. The Complaint could not be more explicit in alleging that the Chestnut Plan "fails to comply with or properly apply . . . criteria" enumerated in Article 4, Section 6 of the Michigan Constitution. Amend. Compl. ¶ 109. Although Count II intersperses alleged violations of the federal Equal Protection Clause, *id.* ¶¶ 99, 103, 118, 122, these assertions carry no significance apart from allegations concerning "state constitutional requirements, *id.* ¶ 121. The Complaint alleges that the "arbitrary boundary drawing" allegedly "in violation of the Fourteenth Amendment's equal-protection guarantee" is a "failure" in the "respect" of the Commission's alleged non-compliance with "neutral, and traditionally accepted, redistricting criteria . . . codified at Article IV, Section 6(13) of the Michigan Constitution." *Id.* ¶¶ 6–7; *see also id.* ¶ 106; PI Br. PageID.119, 122, 129-130 (alleging state-law violations in prominent headings).

Where pleadings assert state and federal violations in parallel, the question becomes "the extent to which *federal*, rather than State, law must be enforced to vindicate the federal interest." *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 293 (4th Cir. 2001) (quotation marks omitted). For example, the three-judge court in *Alabama Legislative Black Caucus* rejected an equal-protection claim lacking any identified standard other than "the whole-county provisions of the Alabama Constitution," concluding "that we lack the subject-matter jurisdiction to entertain a claim that state officials violated state law." 988 F. Supp. 2d at 1304. Count II is no different. It calls for relief that would, in effect, "instruct[] state officials on how to conform their conduct to state law." *Pennhurst*, 465 U.S. at 106.

II. The Equal Protection Clause Does Not Mandate Traditional Redistricting Criteria

Count II, in addition, has no federal constitutional underpinnings. No authority holds that "[a] Fourteenth Amendment Equal Protection violation arises when a legislature or commission implements traditional redistricting criteria in an inconsistent and arbitrary manner." Amended Compl. ¶ 103; *see also* PI Br. PageID.119 (citing no authority for this rule). To the contrary, the Supreme Court has held that "[t]he Constitution does not mandate regularity of district shape." *Bush v. Vera*, 517 U.S. 952, 962 (1996) (plurality opinion); *see also id.* at 1000–01 (Scalia, J., concurring).

Plaintiffs misstate the significance of traditional districting principles. Courts "recognize[]" these principles, Compl. ¶ 49, only for their *evidentiary* value in signaling independently significant constitutional harms, such as where a redistricting authority "subordinated traditional race-neutral districting principles . . . to racial considerations" subject to strict scrutiny. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). The Supreme Court has made clear that "[s]hape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 798 (2017) (quoting *Miller*, 515 U.S. at 798). "The Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications." *Id.*

Thus, even if "traditional redistricting criteria serve as means to prevent unconstitutional gerrymandering and ensure compliance with federal law," Compl. ¶ 50, the Constitution does not directly incorporate these principles as independently enforceable legal obligations. Even a "stark manifestation" of departure from traditional districting principles is not

"a constitutional violation." *Miller*, 515 U.S. at 913. Plaintiffs' authorities outside the racial-gerrymandering context concern the "legislative policies might justify some variance" from equality of population in districts, *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *see also Larios v. Cox*, 300 F. Supp. 2d 1320, 1346–47 (N.D. Ga. 2004) (three-judge court), and the compactness threshold requirement governing Section 2 Voting Rights Act claims, *see Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (plurality opinion). They cite no federal authority invalidating a redistricting plan solely for failure to satisfy a court's notion of good-government values.

Plaintiffs' theory cannot withstand *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), which held that claims of "partisan gerrymandering" are non-justiciable in federal court. *Id.* at 2494. In the process, it rejected the argument that "fairness should be measured by adherence to 'traditional' districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents." *Id.* at 2500. The Court explained the problem with constitutionalizing these principles:

> If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court "reverse gerrymander" other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.

Id. at 2501. Thus, the Court again dismissed the notion that traditional districting principles are constitutionally mandated; it endorsed a prior opinion of Justice Kennedy concluding that "traditional criteria such as compactness and contiguity 'cannot'" be "'used as the

basis for relief,'" *id.* at 2500 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 308 (2004) (Kennedy, J., concurring in the judgment)); and it reiterated the Court's prior rejection of a challenge to a Pennsylvania congressional plan, even though "Pennsylvania's legislature 'ignored all traditional redistricting criteria, including the preservation of local government boundaries,'" *id.* at 2498 (quoting *Vieth*, 541 U.S. at 272–73 (plurality opinion)). The traditional-districting-principles argument gained traction only in the dissent, which argued that fairness should be measured "[u]sing the criteria the State itself has chosen." *Rucho*, 139 S. Ct. at 2521 (Kagan, J., dissenting).

It is of no moment that Plaintiffs are not arguing that the Commission's "intent was to discriminate against voters who supported" a given party's candidates, as the plaintiffs in *Rucho* argued. *Id.* at 2492 (citation omitted). That only makes for a weaker equal-protection claim. If traditional districting principles cannot serve as a baseline "to measure how extreme a partisan gerrymander is," *id.* at 2505, they certainly cannot be enforced in federal court by their own terms. The problem in *Rucho* was that there are no "judicially manageable standards for deciding" gerrymandering claims, *id.* at 2491, and the Supreme Court has concluded that "[t]raditional redistricting principles . . . are numerous and malleable." *Bethune-Hill*, 137 S. Ct. at 799. They are no more manageable here than in *Rucho*.[3]

Besides, Plaintiffs' claim is, on its face, just a watered-down claim of "gerrymandering," as they themselves put it. Compl. ¶ 50. They contend that traditional districting principles ensure that voters are "selecting a candidate that can represent both the individual's interests and the common interests of the community within the district," Compl. ¶ 110; that

[3] Plaintiffs' passing reference to "the First Amendment," PI Br. PageID.121, also invokes a theory rejected in *Rucho*. *See* 139 S. Ct. at 2504.

voters' "right to vote is" is protected, as is "their right to associate with their fellow citizens to advance the interests of the community, township, and county," *id.* ¶ 113; that "voters will be able to elect candidates who can represent the interests of both the individual and the community," *id.* ¶ 118; and that voters' "expression of an individual's preference for a congressional representative" will be recognized, *id.* ¶ 119. These are non-justiciable policy arguments with no connection to the Constitution. Because Plaintiffs do not argue that the Chestnut plan was "motivated by a racial purpose or object," *Miller*, 515 U.S. at 913,[4] and because Count II does not rely on any recognized vote-dilution or denial standard, the claim must be dismissed.

III. Plaintiffs Misinterpret the Michigan Constitution

Count II also lacks merit under state law. Subsection 13 of Article IV, Section 6 establishes seven criteria ranked "in order of priority." Mich. Const. art. IV, § 6(13). Plaintiffs ask the Court to rewrite the priority. No court enjoys that license.

The cornerstone of Plaintiffs' state-law attack is that the third-ranked criterion, "communities of interest," Mich. Const. art. IV, § 6(13)(c), refers to "counties, cities, and townships," PI Br. PageID.124; *see also id.* at 24. Plaintiffs, in turn, contend that the Chestnut plan "unnecessarily contravene[s] some traditionally understood communities of interest," PI Br. PageID.127, and that their alternative plan "reduce[s] the number of split counties" and "the number of ways in which split counties are divided," PI Br. PageID.128, which Plaintiffs interpret to mean the Commission violated Subsection 13(c).

The problem with Plaintiffs' argument is "the plain meaning of the text at the time of ratification." *Adair v. Michigan*, 860 N.W.2d 93, 99 (Mich. 2014). The Constitution plainly

[4] In fact, the Michigan Supreme Court recently held that the Commission correctly avoided racial classifications. *Detroit Caucus v. Indep. Citizens Redistricting Comm'n*, --N.W.2d--, 2022 WL 329915 (Mich. Feb. 3, 2022).

provides that "[c]ommunities of interest may include, but shall not be limited to, populations that share cultural or historical characteristics or economic interests." Mich. Const. art. IV, § 6(13)(c). Not only does this text not limit the Commission to political-subdivision lines, it expressly authorizes the Commission to consider communities of interest from other perspectives, expansively defined.

Additional textual indicia bear this out. First, Subsection 13(c) is not limited to "communities of interest," as Plaintiffs would have it. Instead, Subsection 13(c) provides that "[d]istricts shall reflect *the state's diverse population and* communities of interest." Mich. Const. art. IV, § 6(13)(c) (emphasis added). Even if the phrase "communities of interest" were restricted to political subdivisions, Plaintiffs have not shown that the phrase "diverse population" is so limited. Second, Subsection 13 provides for "consideration of county, city, and township boundaries" in a *lower-ranked* criterion. Mich. Const. art. IV, § 6(13)(c). Plaintiffs acknowledge this by lodging an objection under this criterion as well, PI Br. PageID.129, but they fail to explain how the phrase "communities of interest" means nothing but "counties, cities, and townships," PI Br. PageID.124, when the Constitution separately references "county, city, and township boundaries," Mich. Const. art. IV, § 6(13)(c). Michigan courts read text "in the light of the document as a whole," *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 462–63 (2007), but Plaintiffs rip the phrase "communities of interest" from context and alter the order of priority of the criteria, moving political-subdivision lines up three spots in ranking.

Plaintiffs' contrary positions are unpersuasive. Plaintiffs' contention that Michigan precedent has "long construed the phrase "communities of interest" to include counties, cities, and townships," Compl. ¶ 111, ignores that common-law doctrines "must give way to the

Constitution to the extent they are 'repugnant' to it."[5] *Detroit News, Inc. v. Indep. Citizens Redistricting Comm'n*, --N.W.2d--, 2021 WL 6058031, at *7 (Mich. Dec. 20, 2021) (quoting Mich. Const., art. III, § 7). The Michigan Supreme Court recently held that Article 4, Section 6 of the Michigan Constitution abrogates the Commission's attorney-client privilege, even though that privilege "is the oldest of the privileges for confidential communications and is founded upon . . . necessity . . . ." *Id.* at *6–7 (quotation marks omitted). So too here.

Plaintiffs also complain that the Constitution's definition of communities of interest affords the Commission too much discretion. *See* Brief in Support of Preliminary Injunction Motion, ECF 9, at PageID.123. But that is by constitutional design. The phrasing itself—identifying what communities of interest "may include, but shall not be limited to," Mich. Const. art. IV, § 6(13)(c)—exudes discretion. Further, the constitutional framework circumvents mischief by controlling the Commission's composition, its access to public input, and its adoption of a plan. The Constitution creates "a detailed procedure for the selection of commissioners," to, inter alia, exclude "individuals with current or recent political connection." *Daunt v. Benson*, 999 F.3d 299, 304, 311 (6th Cir. 2021). It also requires the Commission to hold at least 10 public hearings before drafting a single plan, to conduct at least five more public hearings after drafting plans, to convene all its sessions in public with the opportunity for public input, and to publish all plans subject to a vote in a 45-day notice-and-comments process. Mich. Const. art. IV, § 6(8), (9), (10), (14)(b). At every step it must "conduct its hearings in a manner that invites wide public participation throughout the state." *Id.* art. IV,

[5] Plaintiffs' suggestion that "federal law" reads communities of interest this way is unsupported and unsupportable. Compl. ¶ 111; *see Shaw v. Reno*, 509 U.S. 630, 657 (1993) (describing the concept to include "age, education, economic status" and "community"). In any event, the principle is not enforceable under federal law for reasons already stated.

§ 6(10). Then, at the voting stage, the Constitution requires plans to receive support from at least two commissioners of each party and two independent commissioners, at least at the initial stage of voting. *Id.* art. IV, § 6(14).

The broad discretion the Commission is afforded in defining communities of interest makes sense in this larger context. The Constitution creates a trustworthy selection process, maximizes both public input and commissioner agreement to enact a plan, and then affords discretion to the Commission to utilize the information made available to it. The proponents of Proposition 18-2 represented in the ratification debates that members of the public would be able to "tell the Commission how they want their communities defined through a series of public hearings and online before any maps are drawn." Opposition to Motion for Preliminary Injunction, Exhibit B, VNP Website ("What are communities of interest and how will the Commission incorporate them into the maps?").[6] The Commission's ability to account for idiosyncratic concerns expressed by members of different communities is a feature of the constitutional framework, not a bug. There is no basis in the constitutional text for a court—especially a federal court—to usurp the Commission's role.

CONCLUSION

The Court should grant the Commission's motion and dismiss Count II of the Plaintiffs' amended complaint.

[6] Michigan precedent looks to "the circumstances surrounding the adoption of the provision and the purpose sought to be accomplished by the provision" to ascertain its meaning. *Taxpayers for Mich. Const. Gov't v. Dep't of Tech. , Mgmt. & Budget*, --N.W.2d--, 2021 WL 3179659, at *6 (Mich. July 28, 2021).

Dated: February 18, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(b)(ii), Counsel for the Commission certifies that this brief contains 4,039 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, signature block, any certificate, and any accompanying documents.

Dated: February 18, 2022

/s/ David H. Fink
David H. Fink

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2022, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and served via electronic filing upon all counsel of record in this case.

/s/ Nathan J. Fink
Nathan J. Fink