UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DONALD AGEE, JR. et al.,

Plaintiffs,

v.

JOCELYN BENSON, et al.,

Defendants.

Case No. 1:22-CV-00272-PLM-RMK-JTN

RESPONSE OF THE MICHIGAN INDEPENDENT CITIZENS REDISTRICTING COMMISSION TO PLAINTIFFS' OBJECTION TO THE COMMISSION'S PROPOSED REMEDIAL HOUSE PLAN

The Commission's remedial redistricting was an unparalleled success. Commissioners labored under tight deadlines to produce numerous maps with different designs of metropolitan Detroit. They rejected the enjoined districts and began anew and created plans entirely unlike the Hickory plan. Their collaboration ultimately yielded ten maps they deemed worthy of public scrutiny. Exceeding this Court's directives, the Commission held two in-person hearings in Detroit and a virtual town hall.

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Then something remarkable occurred. The public turned out with stunning unanimity in favor of one plan: Motown Sound. An expert analysis shows that Motown Sound received more than five times the favorable comments as the plan with the next-highest total received, and that plan (called Spirit of Detroit) was substantially similar to Motown Sound. Together, the two maps received more than 25 times the favorable comments as the plan with the next-highest total. Among those supporting Motown Sound was Plaintiff Donyale Stephen-Atara who explained that Motown Sound "was drawn by Commissioner Brittani [sic] Kellom, a Detroiter [who] listened to the opinions of Detroiters and drew a map that spoke their needs and concerns." Appx.019a-020a. Public opinion in the divisive redistricting setting has rarely, if ever, been so united. Hearing these voices, and making minor adjustments in response, the

Commission adopted Motown Sound by a 10–3 vote, achieving the requisite support of Democrats, Republicans, and independents to enact the plan into law.[1]

Plaintiffs object to all that. In their view, Detroit residents do not understand their own well-being. Their basic theory is that the Commission did not actually configure Motown Sound, but that one individual named Chris Gilmer-Hill hijacked the process with a plan drawn in secret to avoid incumbent pairings. Not true. As the record clearly shows, Mr. Gilmer-Hill took a plan configured in public by the Commission, proposed modest changes, submitted it back to the Commission, commissioners liked the changes, and they ultimately adopted many of them. Nearly all of Motown Sound was drawn by the Commission, not Mr. Gilmer-Hill. The Commission's public process is meant to glean and build upon such input. Commissioners' openness does not in any way detract from the Commission's command of the process. Plaintiffs' irresponsible contentions wrongly take credit away from the collaborative effort, led principally by Commissioner Kellom, who—more than anyone—deserves credit for Motown Sound.

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Plaintiffs' remaining contentions fare no better. Motown Sound does not preserve the enjoined districts; no material trace of them remains. Nor does Motown Sound violate the Voting Rights Act. It creates 12 districts where Black voters have an equal opportunity or better to control Democratic primaries *without any help from white voters*. Plaintiffs are left making arguments beyond this Court's jurisdiction. The Court lacks power to adjudicate claims to districts where Plaintiffs do not reside and to enforce Michigan law against Michigan instrumentalities. And Plaintiffs' position on incumbency protection fails on the

[1] After the post-hearing modifications, the adopted version of Motown Sound was formally named "Motown Sound FC E1." This memorandum refers to it as Motown Sound.

facts: commissioners did not intend to avoid incumbent pairings. They intended to create a plan that complies with this Court's order. In that, they succeeded.

BACKGROUND

1. This Court permanently enjoined seven Michigan house districts, HD1, HD7, HD8, HD10, HD11, HD12, and HD14, after finding they were configured for predominantly racial reasons without substantial justification. *See* ECF No. 131 at 53, PageID.4756. The Commission subsequently convened to configure a remedial plan. To that end, it held more than 20 public sessions in January and February 2024.[2]

2. Before map-drawing, the Commission adopted remedial procedures. First, it would begin with a blank slate; its mapping consultants unassigned all blocks in the enjoined districts, leaving an empty white space. *See* 1/11/2024 Tr. at 39-42; *see also* 1/16/2024 Tr. at 18. Second, the Commission voted "to establish a map drawing process which begins by all Commissioners proceeding with no consideration of race and with race turned off wherever possible on any map drawing software. And after maps are prepared, there will be a VRA analysis of the proposed maps." 1/11/2024 Tr. at 44-45.[3] Unlike in 2021, VRA considerations (and race, if necessary) would mark the end of the process.

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Under that framework, Commissioners worked on maps from January 16 to 26. The process was collaborative. Commissioners took turns drawing lines, while others offered input. *See* Mapping Process and Procedures at 6. Commissioners were to implement the "[r]anked criteria from the Constitution." *Id.* at 7. When a map was completed, commissioners reviewed it for constitutional compliance. *See, e.g.*, 2/1/2024 Tr. at 76-78

[2] *See* Meeting Notices & Materials, MICRC, https://www.michigan.gov/micrc/meeting-notices-and-materials (last visited Mar. 14, 2024).

[3] *See* Mapping Process and Procedures, MICRC, (Jan. 22, 2024) https://www.michigan.gov/micrc/-/media/Project/Websites/MiCRC/MISC-10/v12224-Mapping-Process-and-Procedures.pdf?rev=ec24875f83ba4e4a9953dd9f6b163422&hash=AB9A695439FA362A416D3C9712D24795.

(reviewing Motown Sound). In that process, commissioners certified that they did not consider incumbents. *See* Mich. Const. Art. IV § 6(13)(e); 2/1/2024 Tr. at 81 (Commissioner Orton explaining districts did "not favor, or disfavor incumbent elected officials as far as we know because we didn't look at that."). Plaintiffs present no evidence that commissioners had incumbency-address information, and commissioners confirmed they did not know where incumbents reside. *See* 1/24/2024 Tr. at 21 (Commissioner Lett explaining he had "not looked to see who the representative was"); 1/24/2024 Tr. at 10 (Commissioner Kellom explaining "we're not to draw based upon like incumbents or folks running. That's not what we're tasked with doing.").

3. The enacted remedial plan, Motown Sound, was born from this process. Its principal author was Commissioner Kellom, a Black native of Detroit. The enacted version evolved from prior drafts of Motown Sound, which built on the Spirit of Detroit and Lily plans; all these were authored principally by Commissioner Kellom.

Chris Gilmer-Hill did not draw these plans. Plaintiffs allege that Mr. Gilmer-Hill configured a plan called Tiger Lily, which is effectively the same plan as Motown Sound. Obj. 5, PageID.5395. They have it backwards. The record is clear that on January 23, Commissioner Kellom created the Lily plan from a plan commissioners created the previous week in public. *See* 1/23/2024 Tr. at 77-88 (showing creation of Lily plan by Commissioner Kellom from plan titled "11824 version 5pm"); *see also* Exhibit A, Remedial Report of Jonathan Rodden (the "Rodden Remedial Rep.") at 7. Mr. Gilmer-Hill submitted an updated "Tiger Lily" proposal on January 25, which he described as a modification of the Commission's existing Lily map. *See* Updated "Tiger Lily" map proposal, https://www.michigan-mapping.org/submission/p9928 (explaining the draft "modifies the Lily map proposal to better reflect COIs that cross the 8-mile boundary between detroit [sic] and its closest suburbs. Based on the partisan analysis of the baseline Lily map performed on

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1/24, I've updated the map configuration to restrict changes more narrowly to the Detroit area, and I've reconfigured parts of Eastside detroit and Highland Park based on public comment and conversations with residents in those areas."); *see also* Rodden Remedial Rep. at 7-8. Approximately 84 percent of the population in Mr. Gilmer-Hill's Tiger Lily map was still in the same districts as in the Commission's Lily map. Rodden Remedial Rep. at 8-9. Put differently, most of Mr. Gilmer-Hill's proposal was not of his authorship; commissioners (principally Kellom) authored it, and he built on their work to present his ideas.

Even then, Commissioner Kellom did not import the Tiger Lily plan into the mapping software or otherwise adopt it. She instead created the Spirit of Detroit plan from the Lily plan, 1/24/2024 Tr. at 73; 1/25/2024 Tr. at 20, and revised it line-by-line. 1/25/2024 Tr. at 20-35, 39-49. Commissioner Kellom explained that she incorporated concepts from Tiger Lily because the Commission had "been getting the same comment and not just in this round of public comments but we've been hearing about the urgency to merge the communities of interest that would entail crossing eight mile so that we're pulling parts of Royal Oak Township to keep that whole." 1/25/2024 Tr. at 21. She understood this implemented, not just one person's concepts, but a broad community consensus. Commissioner Kellom believed the end result "allowed us to include more communities and be more authentic to neighborhoods and people that live in the area" and to "stay within communities that have relationship with each other. Communities that rely on common resources and that have asked to stay together to -- for a variety of reasons." 1/25/2024 Tr. at 48. Others agreed. 1/25/2024 Tr. at 48 (Commissioner Callaghan commenting that the plan "reflects the comments very well"); 1/25/2024 Tr. at 49 (Commissioner Weiss commenting that "[Commissioner Kellom] did a very good job on this map.").

4. On January 29, after many draft plans were complete, the Commission received an analysis from VRA counsel Mark Braden and expert Dr. Maxwell Palmer.

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1/29/2024 Tr. at 19-41 (initial analysis); 1/30/2024 Tr. at 20-27 (Dr. Palmer); 2/1/2024 Tr. at 41, 56-58, 74-75 (analyses of Motown Sound).[4]

The analysis focused on Democratic primaries. At the liability stage, the experts agreed that an absence of helpful Democratic primary information renders it difficult to ascertain whether Detroit-area districts provide equal minority opportunity in primaries. *See, e.g.*, 2.TR 123:17-124:2, PageID.2663-2664. To surmount this problem, and address the Court's determination "that the elections in these districts are decided in the Democratic primaries," ECF No. 131 at 113, PageID.4816, Mr. Braden devised an innovative approach that analyzes which racial group is likely to control the Democratic primary.[5] Mr. Braden directed Dr. Palmer to estimate the available Democratic primary pool (i.e., Democratic registered voters) and the Democratic primary turnout in elections that can be reconstituted into proposed districts. 1/29/2024 Tr. at 21-22; *see also, generally,* Exhibit B, Maxwell Palmer Remedial Rep (the "Palmer Remedial Rep.") (describing in more detail the methodology). That analysis estimates the participation by race in Democratic primaries and the percent of the available Democratic primary pool of voters by race. 1/29/2024 Tr. at 25. Mr. Braden concluded that, "if the majority of [the] electorate . . . in the democratic primary is Black," the Black community will have "an equal opportunity to elect [its] candidate of choice." 1/29/2024 Tr. at 22.

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Mr. Braden advised that minor adjustments to improve Black opportunity in Democratic primaries could properly be defended as narrowly tailored for VRA compliance.

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[4] *See also* Redistricting & Voting Rights Act Compliance Presentation, (Jan. 29, 2024), https://www.michigan.gov/micrc/-/media/Project/Websites/MiCRC/MISC-10/MICRC---Braden-Presentation-on-Plans-FINAL.pdf?rev=5e76d38ca72d4fe895ea2e0466eeb451&hash=A95086DD9E94730F7C196BAC85BDF744.

[5] Counsel complied with this Court's directive that an ethical wall separate the VRA advisors of Baker & Hostetler from the litigators of Baker & Hostetler. Thus, the litigators at Baker & Hostetler learned of Mr. Braden's approach in transcripts and videos of public Commission meetings, just like any other interested persons.

1/29/2024 Tr. at 29. Mr. Braden emphasized, however, that commissioners should only "tweak" plans for this purpose. 1/29/2024 Tr. at 31.

5. Commissioners considered additional changes. On February 1, Commissioner Kellom created Motown Sound from the Spirit of Detroit plan. 2/1/2024 Tr. at 33. She made alterations in the areas of Harper Woods, the Grosse Pointes, Eastpointe, Roseville, and St. Clair Shores based on "public comment" and without looking to racial information. *See* 2/1/2024 Tr. at 33-40. That same day, she submitted the draft Motown Sound plan to Dr. Palmer, 2/1/2024 Tr. at 41, and his return analysis showed HD10 was close to becoming an opportunity district but came up short, 2/1/2024 Tr. at 57. Commissioners collaborated for additional minor revisions (moving about 5,000 inhabitants) and sent the plan "off for VRA analysis." 2/1/2024 Tr. at 58-62. When that analysis showed the district had become "a [p]erforming district," 2/1/2024 Tr. at 75, the Commission ended revisions and voted 10–3 to forward Motown Sound for public comment. 2/1/2024 Tr. at 77-80.

6. Ten proposed plans were published by the Court's February 2 deadline, which began a 21-day comment period. *See* ECF 165. Online public comments overwhelmingly favored Motown Sound, Appx.001a-71a, and expressly supported the configuration of Harper Woods, the Grosse Pointes, Eastpointe, Roseville, and St. Clair Shores. Appx.063a; Appx.070a; Appx.149a-160a.

On an organized basis, Plaintiffs submitted no comment on the ten proposed plans and proposed no plan of their own to the Commission. But that apparently was not Plaintiffs' original plan. On February 20, multiple Plaintiffs and one of their attorneys, Jennifer Green, attended a press conference hosted by Democratic representatives, Sherry Gay-Dagnogo, two of Plaintiffs' trial witnesses (Lamar Lemmons and Virgil Smith), and others, to announce

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Plaintiffs' remedy-phase strategy and a proposed plan. *See* Exhibit C, Press Conf. Tr. at 2-4.[6] Plaintiffs' counsel revealed that Dr. Trende had analyzed all ten Commission plans. *Id.* at 5-6. Another representative then spoke, expressed opposition to "the Daisy map" and "some of the Bergamot maps," advocated for "the maps that have been put together by the Congressional Black Caucus," and urged that "we [also] need to look at some of the others like the Riverwalk [and] the Spirit of Detroit." *Id.* at 11.

The group then went on to reveal a plan "commissioned by the Michigan Democratic Party, Black Caucus" with "13 majority, minority seats in Southeast Michigan." *Id.* at 13-14. Plaintiffs promised that Dr. Trende would "do an analysis" of their plan and that they would "unveil what the actual name of the map is and try and upload files" to "the portal" (i.e., on the Commission's website). *Id.* at 22. Two other speakers at the press conference advertised the times and locations of the February 21 and 22 public Commission hearings in Detroit and exhorted the public to attend and make their voices heard, presumably in support of their plan. *Id.* at 19, 21.

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None of that happened. Plaintiffs did not produce their alleged Michigan Democratic Party-commissioned map to this Court or to the Commission, nor did they provide Dr. Trende's analysis to the Commission during the public comment process. At no time did Plaintiffs criticize Motown Sound or present any of the positions they presented to this Court on March 8.

Subsequently, the Commission conducted three public hearings: a virtual town hall on February 15, 2024, and two in-person hearings in Detroit on February 21 and 22. No one supported an undisclosed plan with 13 majority-minority districts. Instead, the comments overwhelmingly favored Motown Sound. Appx.072a-148a; Rodden Remedial Rep. at 2-3.

[6] A publicly accessible video recording of this Press Conference is available on the Facebook page of Ms. Gay-Dagnogo, at https://www.facebook.com/sherry.gaydagnogo/videos/1559763484841184/ (visited Mar. 14, 2024). The Commission had this video transcribed by a court reporting service=.

Indeed, those individuals associated with Plaintiffs group supported—not the undisclosed plan—but Motown Sound. Plaintiff Donyale Stephen-Atara supported Motown Sound for a "variety of reasons," applauding Commissioner Kellom, "a Detroiter [who] listened to the opinions of Detroiters and drew a map that spoke their needs and concerns, as well as was constitutional. She has been the only Commissioner that has consistently, since the creation of the Commission, that has attempted to meet the needs of Detroiters." Appx.019a-020a.

Spirit of Detroit was also submitted for public comment. It received the second most support, but considerably less than Motown Sound. Rodden Remedial Rep. 2-3, Tbl. 1.

7. The Commission met on February 27 and 28 to deliberate over and adopt a final remedial plan. During that process, the Commission made certain modifications to Motown Sound in MHD4, MHD8, and MHD16,[7] based on overriding public input concerning Arab American communities. 2/27/2024 Tr. at 33-41; 2/28/2024 Tr. at 56; Rodden Remedial Rep. at 20, Fig. 2d. Mr. Braden confirmed the changes had "no effect on [his] belief that the Court would conclude that the plan complies with the Voting Rights Act," 2/28/2024 Tr. at 10, and the Commission again evaluated the plan under the constitutional criteria, 2/28/2024 Tr. at 56-58, 61-62.

On February 28, the Commission voted to adopt Motown Sound, as revised. Commissioners selected it because of the overwhelming public support. 2/28/2024 Tr. 73-74; *see also* 2/28/2024 Tr. at 66 (Commissioner Curry explaining that, as "a native of Detroit . . . for over 50 years," she believed Motown Sound reflected "the sentiments of the people that live in Detroit"); 2/28/2024 Tr. at 69 (Commissioner Kellom describing the "resounding voice for the Motown Sound map" and concluding "[w]e can talk metrics all day and partisan fairness all day, but number one is communities of interest, which is code for people. And in this case it's code for Black people. And they have spoken about this map.

[7] Districts in Motown Sound are referred to as "MHD#."

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And there's no other map that touches Motown Sound when we are talking about neighborhoods."); 2/28/2024 Tr. at 65 (Commissioner Andrade explaining her support for Motown Sound because it was "the best collaborative map and we heard just so many people speak up for that map").

The final vote was 10–3. Four Democratic commissioners, two Republican commissioners, and four independent commissioners voted for Motown Sound. 2/28/2024 Tr. at 74.

LEGAL STANDARD

This case challenges an act of the Commission under its "legislative functions." Mich. Const. art. 4, § 6(22). Notwithstanding the remedial posture, that act is "the governing law unless it, too, is challenged and found to violate the Constitution." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (plurality opinion). This standard requires Plaintiffs to prove that "it fails to meet the same standards applicable to an original challenge of a legislative plan in place." *McGhee v. Granville Cnty., N.C.*, 860 F.2d 110, 115 (4th Cir. 1988) (citing *Upham v. Seamon*, 456 U.S. 37, 42 (1982) (per curiam)). As the Supreme Court recently made clear in a remedial redistricting case, "[t]he allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination." *Abbott v. Perez*, 585 U.S. 579, 603 (2018). It is therefore "the plaintiffs' burden to overcome the presumption of legislative good faith and show that the" Commission in 2024 "acted with invidious intent." *Id.* at 605.

As applied in cases where the "only injuries the plaintiffs established . . . were that they had been placed in their legislative districts on the basis of race," that doctrine directs that a federal court's "remedial authority" is "limited to ensuring that the plaintiffs were relieved of the burden of voting in racially gerrymandered legislative districts." *North Carolina v. Covington*, 585 U.S. 969, 978 (2018) (per curiam). If federal standards are satisfied, "a reviewing court must then accord great deference to legislative judgments about the exact

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nature and scope of the proposed remedy, reflecting as it will a variety of political judgments about the dynamics of an overall electoral process that rightly pertain to the legislative prerogative of the state and its subdivisions." *McGhee*, 860 F.2d at 115 (collecting cases). Simply put, "[i]f the legislative remedy does not violate the Constitution or the Voting Rights Act, the 'district court is not free . . . to disregard the political program of a state legislature on other bases.'" *Whitest v. Crisp Cnty. Sch. Dist.*, 601 F. Supp. 3d 1338, 1344–45 (M.D. Ga. 2022), *aff'd*, No. 22-11826, 2023 WL 8627498 (11th Cir. Dec. 13, 2023); *see also Seastrunk v. Burns*, 772 F.2d 143, 151 (5th Cir. 1985).

ARGUMENT

I. Motown Sound Remedies the Violation

A. Motown Sound Does Not Perpetuate the Prior Racial Goals

Motown Sound relieves Plaintiffs "of the burden of voting in racially gerrymandered legislative districts."[8] *Covington*, 585 U.S. at 978. A plan fails that standard where it "perpetuat[es] the effects of the racial gerrymander." *Id.* at 973 (citation omitted). Motown Sound does not do that. It is a fundamentally different plan from Hickory.

1. The Court held that seven Hickory districts, HD1, HD7, HD8, HD10, HD11, HD12, and HD14, were configured for predominantly racial reasons without substantial justification. *See* ECF No. 131 at 53, PageID.4756. The Court found the Commission operated under an "across-the-board" "constraint" of "racial targets" from 35% to 45% BVAP. *See id.* at 55-56, PageID.4758-4759. The Court found that BVAPs in the challenged Hickory districts ran from 38% to 44%. *Id.* at 49, PageID.4752.

[8] Text in this brief assuming legal violations or gerrymandering are confined to the remedial posture of this case and are not meant to concede agreement with the Court's liability ruling or waive of any challenges to it on appeal.

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The impact of those goals is gone. Two districts (MHD4 and MHD5) in Motown Sound have BVAPs above 80% (89.6% and 80.7%), three others (MHD9, MHD8, and MHD11) are at least 65% BVAP (66.8%, 66.3%, and 65.0%) and three more (MHD7, MHD16, and MHD18) are above 50% (56.2%, 54.4%, and 52.2%). Palmer Remedial Rep. at ¶ 13 & Tbl. 2. It is clear from this alone that the alleged racial targets were neither repeated nor perpetuated. At the liability stage, Plaintiffs' expert, Dr. Trende, proposed that a "race-neutral ensemble" of plans would produce roughly nine districts from 50% to 90% BVAP, PX020-0070-71, and Plaintiffs—in successfully opposing the Commission's stay application in the Supreme Court—argued that district BVAPs above 70% will result "absent any racial consideration" because that outcome "reflect[s] the natural geographic distribution of Black voters in Detroit." Opposition to Emergency Stay Application, No. 23A641, at 26 (filed Jan. 17, 2024). Moreover, Plaintiffs previously represented to this Court that curing the enjoined district may require reconfiguration of "more than *double* the amount of districts that were originally invalidated," ECF No. 136 at 9, PageID.4852, and Motown Sound does that, reconfiguring fifteen house districts even though only seven were enjoined, Rodden Remedial Rep. at 5.

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Motown Sound has all indicia of a plan configured without racial predominance, including those Plaintiffs have previously advocated.

2. All probative evidence bears this out. Start with the "direct evidence." *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 187 (2017). The Commission avoiding carrying forward past manifestations of intent by scrapping all the invalidated districts in full and beginning anew. *See* 1/11/2024 Tr. at 39-42; 1/16/2024 Tr. at 18. The Commission also began drawing race-blind by turning off the mapping software's reporting of racial

demographic information on the screen, so commissioners could not see the racial composition of districts they were creating. *See* 1/11/2024 Tr. at 44-45.

Then, as described above, the Commission configured districts in Detroit by reference to state criteria, especially the communities-of-interest criterion, implementing commenters' ideas and commissioners' understandings. In response to public comments, MHD1 preserves a community of interest between River Rouge and Ecorse, 1/16/2024 Tr. at 77, an industrial interest shared among Oakwood Heights, Delay, Carbon Works, Springwells, and Claytown, 1/18/2024 Tr. at 64, a southwest Detroit community in Mexicantown, Hubbard Farms, Central Southwest and Delray, 1/18/2024 Tr. at 20, and a Latin American community of interest between Mexicantown, Hubbard Farms, and West Side industrial. 1/23/2024 Tr. at 30. MHD1 also separates the more industrial portions of Detroit from the downtown and midtown communities of interest on the Detroit riverfront. 1/18/2024 Tr. at 53, 65. MHD7 maintains a Bengali community around Hamtramck, 1/17/2024 at 30-31;1/18/2024 Tr. at 87, and the neighborhoods of Airport Sub, Franklin Park, North End, Wade, and North Campau. 1/25 Tr. at 40; *see* Motown Sound Map. MHD7 also separates the Bengali community from the downtown riverfront community. 1/18/2024 Tr. at 41-42, 63.

MHD8 includes University District, Palmer Woods, Grixdale Farms, Chaldean Town, Sherwood Forest Historic District, and Green Acres along with the Ferndale in response to public comment suggesting that the Commission preserve a community shared between northern Detroit and Ferndale. 1/25/2024 Tr. at 40. It also preserves a LGBTQ community of interest between Ferndale and the Detroit neighborhood of Palmer Park. 1/16/2024 Tr. at 32. MHD10 preserves East English Village, Morningside, and Cornerstone Village together in response to public comment, 1/16/2024 Tr. at 28, 1/23/2024 Tr. at 84, 2/1/2024 Tr. at 35, and shared interests (related to resources and parks) between Harper

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Woods and the Grosse Pointes. 1/25/2024 Tr. at 46; Appx.070a; Appx.149a-162a. MHD11 encompasses areas south of 10 Mile and Frazho Road and includes Nolan, Butler, Hawthorne Park, Northeast Central, Cadillac Heights, Conant Gardens, and Krainz Woods between Eight Mile Road and Six Mile Road. 1/25/2024 Tr. at 22-27. MHD12 keeps Eastpointe whole, and combines the similar Detroit neighborhoods Regent Park, Mapleridge, Denby, and Outer Drive-Hayes. *See* 2/1/2024 Tr. at 33. MHD14 maintains the Center Line community of interest and similar communities solely in Macomb County. 2/22/2024 Tr. at 29.

Only after the Commission had multiple complete plans did it turn to the VRA. Its considerations bore no resemblance to the 2021 VRA advice: Mr. Braden looked to Democratic primary data and proposed no BVAP targets. The process ensured that racial considerations would come at the end of the mapping stage, not the beginning, and that they would not drive the overall design of districts.

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3. The "circumstantial evidence" proves that race did not predominate. *Bethune-Hill*, 580 U.S. at 187.

a. Motown Sound is a complete rewrite of the enjoined districts. *See* Rodden Remedial Rep. at 5 & Fig. 1 ("in the Commission's proposed map, the remedial area has been completely redrawn, along with the area to the immediate west").

The quantitative data bear this out. Dr. Rodden analyzed the percentage of residents in enjoined districts assigned to new districts, measuring (1) the percentage of residents in enjoined districts assigned to different-numbered districts in Motown Sound and (2) the percentage of residents of Hickory districts who reside outside the largest fragment of a Hickory district within a Motown Sound district. He compared the other nine proposed plans under these metrics.

The results are striking. The respective measures showed 60.05% and 43.71% of residents in enjoined districts assigned to new districts in Motown Sound. Rodden Remedial Rep. at 7, Tbl. 2. These changes were widespread. Residents of Hickory's HD8 and HD13 ended up in five different districts, residents of Hickory's HD6, HD7 and HD10 ended up in four different districts, residents of Hickory's HD1, HD3, HD5, HD9, HD12, and HD14 ended up in three different districts, and residents of HD16 ended up in two different districts. *Id.* at 27, App'x. Tbl.2. As for enjoined districts, Hickory's HD8 shares just 43.8% of residents with the closest Motown analogue; Hickory's HD11 just 44.1%; Hickory's HD10 just 48.2%; Hickory's HD12 and HD14 just 53.8%; and Hickory's HD7 just 63.8%. *Id.* The remaining enjoined district (Hickory's HD1) shares 86.2% of residents with MHD1, but that is no surprise, given its location in the "corner of the remedial area" and comments of the Hispanic/Latino community, which urged the Commission to preserve their community in the district. *Id.* at 5 & App'x Tbl. 2. Compared to the other proposed plans, Motown Sound made among the most changes to the district. *Id.* at 7, Tbl. 2. MHD1 resembles Dr. Trende's remedial version of the same district. ECF No. 136-3 at 5, PageID.4871. All this confirms that the Commission did not intend to preserve cores of enjoined districts. Plaintiffs make no serious contrary argument.

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b. Plaintiffs have nothing to say of this dramatic change, except to call Motown Sound an "improvement" over Hickory. Obj. 1, PageID.5391.

Their attack relies on Dr. Trende's comparison of so-called racial-gerrymandering index scores between Motown Sound and simulated plans. This index is "meant to summarize the extent to which the distribution of race across the districts of the simulated plans is different from that of the Commission's plan." Rodden Remedial Rep. at 17; *see also*

Trende Remedial Rep. at 26-27, PageID.5442-5443. The Court's liability ruling did not credit Plaintiffs' racial gerrymandering index, and it should not do so now.

For starters, Plaintiffs cite no peer-reviewed research or judicial opinion ratifying the racial-gerrymandering index. *See id*. Dr. Rodden is unaware of it being "validated in peer-reviewed publications or accepted by courts." Rodden Remedial Rep. at 16. Just last year, the Supreme Court criticized computer simulations, warning that "courts should exercise caution before treating results produced by algorithms as all but dispositive of a § 2 claim." *Allen v. Milligan*, 599 U.S. 1, 36 & n.8 (2023). Plaintiffs ask this Court to throw caution to the wind by accepting, with minimal adversarial vetting, Plaintiffs' untested approach even as the Supreme Court rejected simulations performed by more established scholars. *See id.* at 36-37 (citing and refuting analysis from Drs. Imai and Duchin).

Moreover, Dr. Trende does not supply reasonable comparators. Simulation analyses must compare apples to apples, which is why "it is important to make sure the simulations are constrained in the same way that the district drawers were constrained." Rodden Remedial Rep. at 12. It is unreliable to compare a plan to simulated plans that do not "accurately represent[] the districting process," such as by "ignor[ing] certain traditional districting criteria" like "keeping together communities of interest." *Allen,* 599 U.S. at 34. In addition, "quantifying, measuring, prioritizing, and reconciling" competing redistricting criteria requires "map drawers to make difficult, contestable choices." *Id.* at 35 (citation and quotation marks omitted). Those choices can impact results because "different criteria could move the median map toward different . . . distributions,' meaning that 'the same map could be [lawful] or not depending solely on what the mapmakers said they set out to do." *Id.* (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2505 (2019)). Simulation models are sensitive; subtle choices inflict massive change.

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Here, at least three methodological failures make Plaintiffs' analysis "unreliable." Rodden Remedial Rep. at 17. First, the simulations ignored "communities of interest and Detroit neighborhoods." *Id.* Second, Plaintiffs' simulations model "does not hold fixed the specific municipalities that were kept whole in the commission's plan." *Id.* And third, the "study area" of the simulations "includes several additional districts that were not altered in the Commission's plan and were not deemed unconstitutional by the Court." *Id.* As Dr. Rodden points out, "[w]hen attempting to draw inferences from such a small geographic area and a small number of districts, such seemingly small details matter a great deal." *Id.* at 17-18. When Dr. Rodden corrected these failures, Motown Sound's gerrymandering index score fell close to the mean of the simulated plans' scores—i.e., it is not shown to be a racial gerrymander. *Id.* at 18 & Fig. 5.

Dr. Trende's analysis produces puzzling results that confirm its flaws. Dr. Trende finds that the Tulip and Daisy plans are not racial gerrymanders. Trende Remedial Rep. at 31, Fig. 20, PageID.5447. But Dr. Trende argued that the "Tulip map . . . maintains much of the gerrymander from the Hickory map[,]" *id.*, and changed many fewer districts than Motown Sound, *see id.* at 2 (describing Tulip and Daisy as least-change plans that revised just ten districts); Rodden Remedial Rep. at 5 (the proposed plan revises 15 districts). It is implausible that a reliable test would condemn Motown Sound as a racial gerrymander, but not Tulip and Daisy. "Something seems to have gone awry in either the analysis or presentation of results." Rodden Remedial Rep. at 17.

c. Plaintiffs next present a "dotplots" graph that compares the BVAPs of the highest BVAP districts in Motown Sound with those of Plaintiffs' 100,000 simulated plans. Trende Remedial Rep. at 25-26 & Fig. 16, PageID.5441-5442. Plaintiffs suggest that Motown Sound does not "purge" the racial gerrymander and "artificially depressed the BVAPs in the

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most heavily Black districts, and raised them in a handful of others" compared to the simulated plans. *Id.* at 25. But, as Dr. Rodden concludes, "at each rank [of district BVAP], the BVAP of the Commission's plan fits comfortably within the range of the simulated values, which would seem to indicate a *lack of racial gerrymandering* according to his approach." Rodden Remedial Rep. at 17 (emphasis added).

In fact, Plaintiffs' analysis indicates that Motown Sound is not an outlier in containing eight majority-Black districts. Plaintiffs' "race-blind" simulations—used to support the racial gerrymandering index and the "dotplots" graphs in Dr. Trende's Remedial Report—were most likely to produce "8 majority-Black districts." Palmer Remedial Rep. at ¶ 21. The analysis cuts against Plaintiffs' demand for ten majority-Black districts, since "[o]nly four percent of Dr. Trende's simulated maps yielded ten or more majority-Black districts," a result that is "unlikely" to occur by chance and would suggest such a map was itself a racial gerrymander. *Id.*

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B. Plaintiffs Do Not Prove an Equal-Protection Violation

1. Plaintiffs Lack Standing to Challenge HD16, HD17, and HD18

The Court lacks Article III power to consider Plaintiffs' argument concerning "[t]he Hickory Plan's House Districts 16, 17, and 18." Obj. 13, PageID.5403. Plaintiffs contend that these districts were drawn to implement a "Racially Motivated 'Spoke' Concept," *id.* (boldface omitted), but they were not challenged, they were not enjoined, and Plaintiffs admit "there are there presently no Plaintiffs residing in these three districts."[9] *Id.*

Plaintiffs' contention is foreclosed by decades of precedent holding that a "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established," and that, in a redistricting case, "the remedy that is proper and sufficient lies

[9] The term "presently" makes this statement misleading: there were *never* plaintiffs in these districts. First Amend. Compl. ¶¶ 17-36, ECF No. 8, PageID.88-107.

in the revision of the boundaries of the individual's own district." *Gill v. Whitford*, 585 U.S. 48, 66, 68 (2018) (citation omitted). This Court has no authority to remedy any districts other than the Plaintiffs' "own district[s]" and "only such districts as are necessary to reshape" those districts. *Id.* at 66-67; *see Bethune-Hill v. Virginia State Bd. of Elections*, 368 F. Supp. 3d 872, 884 (E.D. Va. 2019) (three-judge court) ("We therefore recognize the need to ensure that given changes actually are required to remedy the violations in the invalidated districts."). Once "the racial gerrymanders at issue in this case [are] remedied," this Court's "proper role in [Michigan's] legislative districting process [is] at an end." *Covington*, 585 U.S. at 979.

Plaintiffs do not contend that alterations to HD16, HD17, and HD18 are necessary to remedy HD1, HD7, HD8, HD10, HD11, HD12, and HD14. They contend that viable claims lie against HD16, HD17, and HD18 in their own right. Obj. 13-15, PageID.5403-05. And their own presentation makes it clear that HD16, HD17, and HD18 are beyond any appropriate remedial scope: on January 2, Plaintiffs presented a "compliant, race-blind map[]" prepared by Dr. Trende, ECF No. 136 at 9, PageID.4852, and it did not reconfigure HD16, HD17, and HD18, *see* ECF No. 136-1 at 5, PageID.4871. In fact, it reconfigured *fewer* districts (10) than Motown Sound reconfigured (15), *see id.*, and did not even reconfigure HD5, Hickory's least compact districts, which Motown Sound reconfigures, *see id.* at 4-5, PageID.4870-71. Plaintiffs obviously do not believe redrawing HD16, HD17, and HD18 is necessary to remedy HD1, HD7, HD8, HD10, HD11, HD12, and HD14.[10]

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[10] Plaintiffs observe that one plan before the Commission, Szetela 4, reconfigured the so-called "western spoke districts." Obj. 13, PageID.5403. But Commission's prerogative to redraw these district under its expansive *legislative* power does not empower this Court to impose such changes under its limited *judicial* power, which is remedial in nature, not legislative. *See Covington*, 585 U.S. at 978-79 (reversing three-judge court's attempt to enforce state law ban on mid-decade redistricting, because it had "nothing to do" with the remedial task).

Plaintiffs long ago conceded (as they were compelled to) that they have standing only to challenge districts where they presently reside, and this Court dismissed Plaintiffs' challenge to HD13 on this basis. *See* ECF No. 81 at 4, PageID.2032 ("[A]s plaintiffs conceded at oral argument, we lack jurisdiction over any claims involving that district."). It is troubling that Plaintiffs are now asking the Court to do what they long ago admitted it cannot do.

The remedial posture of this case does not alter the Court's Article III limitations. The first case to announce the principles of redistricting standing was a remedial case. *United States v. Hays*, 515 U.S. 737 (1995). In *Hays*, as here, a federal three-judge district court enjoined a redistricting plan because of unjustified racial predominance. *See id.* at 741. In *Hays*, as here, the legislature "enacted a new districting plan." *Id.* And in *Hays*, as here, the plaintiffs challenged it. *Id.* at 742. The trial court enjoined that plan as well, but the Supreme Court reversed, finding that the plaintiffs lacked standing because they did not live in the district they challenged. *Id.* at 743-47. The doctrine of *Hays* has been reaffirmed perhaps too many times to count. *See, e.g.*, *Gill*, 585 U.S. at 66-67 (reaffirming and extending the holding of *Hays*); *Shaw v. Hunt*, 517 U.S. 899, 904 (1996) (*Shaw II*) (dismissing challenge to congressional district where no plaintiff resided); *Sinkfield v. Kelley*, 531 U.S. 28, 30 (2000) (per curiam) (rejecting racial-gerrymandering challenge to "majority-white districts . . . under a redistricting plan whose purpose was the creation of majority-minority districts, some of which border appellees' districts"); *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality opinion) ("In the racial gerrymandering context, the predominant intent test has been applied to the challenged district in which the plaintiffs voted.").

Plaintiffs' challenge to HD16, HD17, and HD18 is baseless, their counsel must know that, and it should be withdrawn, just as their prior challenge to HD13 was withdrawn.

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2. Plaintiffs Do Not Prove Equal-Protection Violations in MHD10 or MHD12

Plaintiffs contend that MHD10 and MHD12 "do not remediate the racial gerrymander; they perpetuate it." Obj. 16, PageID.5406. This is false. Plaintiffs do not carry their demanding burden of establishing an equal-protection violation.

Given the plan's status as legislation, the Court must approach Plaintiffs' assertions with "extraordinary caution." *Miller v. Johnson*, 515 U.S. 900, 911 (1995). It is the "plaintiff's burden . . . to show" predominance. *Id.* at 916. "Race must not simply have been a motivation for the drawing of a majority-minority district, but the predominant factor motivating the legislature's districting decision." *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (*Cromartie II*) (internal citations and quotation marks omitted). This is a "demanding" standard. *Id.* (citation omitted). As noted, the prior finding of a violation does not modify this burden. *See Abbott*, 585 U.S. at 603-06.

a. Plaintiffs principally direct the Court to the BVAPs of MHD10 and MHD12, which they say, at "around 45%," must reflect "the same racial target that Mr. Adelson, Dr. Handley, and General Counsel Fastula gave to Defendants during the initial map-drawing process this Court struck down." Obj. 16, PageID.5406. This argument ignores Plaintiffs' burden to prove motive, not just "effects." *See Miller*, 515 U.S. at 916 (quoting *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). Districts near 45% BVAP are not inherently infirm. *See Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (explaining why a statute that can be "valid if enacted . . . without any impermissible motivation" is invalid with impermissible motivation); *see also Abbott*, 585 U.S. at 604 (discussing *Hunter*). The problem, according to the liability ruling, was that the Commission purposefully achieved those targets to the subordination of non-racial goals, without justification.

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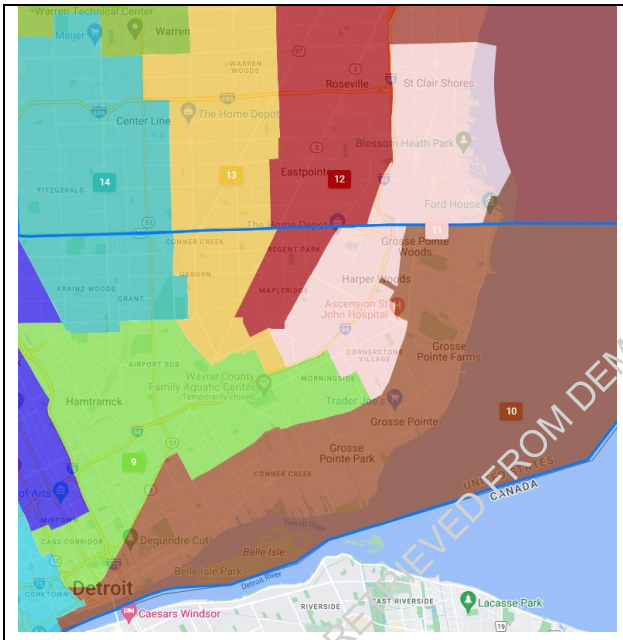
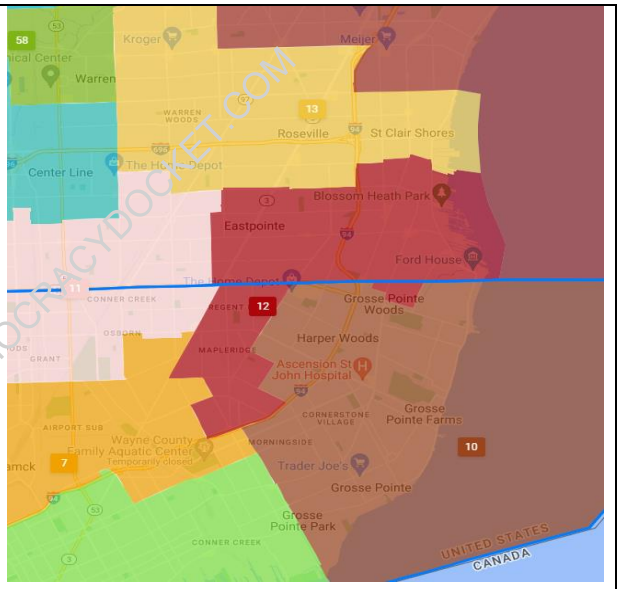
Plaintiffs miss their burden to establish a predominant racial motive in the *new* districts. They ask the Court to consider MHD10 and MHD12 "in the context of Defendants' previous racial machinations" and propose that the "gerrymander" here is "transparent." Obj. 16, PageID.5406. If this cryptic syntax is meant to suggest that MHD10 and MHD12 changed too little of the Hickory analogues to remedy the prior racial intent, it finds no evidentiary support. The Commission "did not reenact" HD10, HD11, or HD12. *Abbott*, 585 U.S. at 604. The districts are transparently different:



Hickory[11]



Motown Sound FC E1[12]

Plaintiffs present no evidence of similarity. Nor could they. As described, the Commission began anew with these districts. And more than 46,900 residents of HD10 were excluded from MHD10, and more than 41,800 residents of HD12 were excluded from MHD12. Rodden Remedial Rep. at 27, App'x Tbl. 2. The Supreme Court has found that

[11] https://michigan.mydistricting.com/legdistricting/comments/plan/280/23 (visited Mar. 14, 2024).
[12] https://michigan.mydistricting.com/legdistricting/comments/plan/341/23 (visited Mar. 14, 2024).

changes to a *congressional* district "significantly altered" it where they "incorporated tens of thousands of new voters and pushed out tens of thousands of old ones." *Cooper v. Harris*, 581 U.S. 285, 295, 310 (2017). The change here is dramatic. *See Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 169 (E.D. Va. 2018) (finding substantial alteration in state house district where changes "moved more than 18,000 people out of" it "and replaced them with about 21,000 others"). The substantial difference between the new and old districts is sufficient to cure any motivational taint infecting the old districts. *Compare Bethune-Hill*, 368 F. Supp. 3d at 885 (adopting special-master-crafted districts, even though they "retain[] certain lines in the invalidated districts we have identified as racially motivated").

b. Plaintiffs also intimate that new racial intent controlled MHD10 and MHD12, based on "'VRA compliance' concerns with the Spirit of Detroit map." Obj. 17, PageID.5407.

As an initial matter, that assertion has no logical connection with the "racial target that Mr. Adelson, Dr. Handley, and General Counsel Pastula gave to Defendants" in 2021. Obj. 16, PageID.5406. Plaintiffs cite no evidence that anyone was advising about, or looking to, targets between 35% and 45% BVAP—or any BVAP target—during the 2024 redistricting. That omission is telling. The Court found liability based on the Commission's public "record" showing "every decision they made, every word they spoke" as "recorded in real time in a body of transcripts that runs some 10,000 pages." ECF No. 131 at 2, PageID.4705. The Commission created the same type of record again. Yet Plaintiffs cite not one reference to a BVAP target. That is because there was none.

Plaintiffs' effort to prove predominance despite that falls flat. To begin, they do not identify what they believe the racial intent even was. As shown, there certainly was no intent to "perpetuate" the prior districts. Obj. 16, PageID.5406. And Plaintiffs do not present evidence of racial predominance, "such as stark splits in the racial composition of populations

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moved into and out of disparate parts of the district, or the use of an express racial target." *Bethune-Hill*, 580 U.S. at 192. Proving predominance is Plaintiffs' demanding burden, *Miller*, 515 U.S. at 916, and they cannot meet it with so little by way of asserting a theory of what occurred. "This Court," like others, "is not in the habit of doing parties' lawyering for them," and it should "decline to take up that task now." *Jeffries v. Barr*, 965 F.3d 843, 860–61 (D.C. Cir. 2020).

Plaintiffs do not even address the right plan. They direct the Court to changes proposed by Commissioner Eid (without reference to racial data) on January 31 to a version of Spirit of Detroit. Obj. 17 n.12, PageID.5407. But the next day, February 1, Commissioner Kellom—the principal author of Spirit of Detroit—took the pen and declined to work from the version as altered by Commissioner Eid; instead, she reverted to the version of Spirit of Detroit prior to his changes, and renamed it "Motown Sound." 2/1/2024 Tr. at 33.

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c. To the extent Commissioner Kellom's February 1 changes can be deemed relevant, in the absence of clarity from Plaintiffs as to their theory of liability, the record confirms that race did not predominate.

Commissioner Kellom made alterations in the areas of Harper Woods, the Grosse Pointes, Eastpointe, Roseville, and St. Clair Shores, and she did not look to racial information. *See* 2/1/2024 Tr. at 33-40. Kellom instead explained that she "was compiling this using public comment," 2/1/2024 Tr. at 35, and that she was "trying to collaboratively draw a map that is a mix of what different COIs have asked for. So [she] pull[e]d from the portal." 2/1/2024 Tr. at 39. Plaintiffs suggest there was public "frustration with" the new configuration. Obj. 16, PageID.5406. That is misleading. The record shows many public comments recommending the configuration Commissioner Kellom implemented, proposing, e.g., that "Harper Woods should be in the same district as Grosse Pointe Woods," because

"[w]e share the same school district," and because "Grosse Pointe and Harper Woods share public services, including mutual fire and police" and "Harper Woods is part of the Grosse Pointe Chamber of Commerce," Appx.156a; that "Harper Woods and the Grosse Pointes" share an "immense" amount of services, including "a school district, the Milk River Water, emergency services" and "the HELM which services all the seniors in the 6 cities," Appx.160a; and "that the Grosse Pointes and Harper Woods have always been connected economically, socially, and politically," Appx.161a. Commissioner Szetela had previously proposed a configuration that placed Harper Woods in a district with Grosse Points based on public comments." 1/18/2024 Tr. at 11.[13]

The ultimate proof is in the pudding. The February 1 changes in HD10 and HD12 mark the only difference between Motown Sound and Spirit of Detroit. Rodden Remedial Rep. at 8. Both plans were presented for public comment. The public feedback overwhelming favored Motown Sound, *not* Spirit of Detroit. *Id.* at 2-3; Appx.001a-148a. Dr. Rodden demonstrates that Motown Sound had a net support of public comments of 104, whereas Spirit of Detroit (in second place) had a net support of 17. Rodden Remedial Rep. at 3 & Tbl. 1. The contest was not close. If Detroit residents truly bore "frustration" with the February 1 changes, Obj. 16, PageID.5406, but otherwise supported the design of Motown Sound, they would have supported Spirit of Detroit, which contains all Motown Sound's policies, except in the Grosse Pointes, Harper Woods, and St. Clair Shores.[14] But the people spoke with near

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[13] Plaintiffs suggest that the Grosse Pointes and St. Clair Shores should have been together in a district instead, *see* Obj. 16, PageID.5406, but the Commission "heard lots of conflicting comment about the Grosse Pointes and St. Clair Shores together," 1/24/2024 Tr. at 45, and "lots of public input against" keeping the five Grosse Pointes and St. Clair Shores together. 1/24/2024 Tr. at 49; *see also* 1/25/2024 Tr. at 51 (Commissioner Kellom explaining that a plan that did not include a lakeshore configuration did "way more for communities of interest and for the districts that we were charged with redrawing.").

[14] Indeed, one might reasonably deduce that, had the comments overwhelmingly favored Spirit of Detroit, the Commission would have adopted it.

unanimity for Motown Sound. Indeed, some explicitly favored the February 1 changes, including endorsement of "district 13," Appx.063a, and keeping the "3 Detroit neighborhoods of East English Village, Cornerstone Village, and Morningside" intact and combined "with the Grosse Pointes," Appx.070a. Notably, Plaintiffs offer no reliable analysis to the contrary.

A district drawn predominantly to respect "communities defined by actual shared interests" does not trigger strict scrutiny. *Miller*, 515 U.S. at 916. The only probative evidence before the Court shows that communities of interest did not predominate.

d. It is true that Commissioner Kellom (like other Commissioners) had an overarching desire that Motown Sound would comply with the VRA and that it, along with several maps were submitted to Mr. Braden and Dr. Palmer. 1/29/2024 Tr. at 19-41 (initial analysis); 1/30/2024 Tr. at 20-27; 2/1/2024 Tr. at 41, 56-58, 74-75 (analyses of Motown Sound). But that merely "demonstrates obedience to the Supremacy Clause of the United States Constitution," which "does not raise an inference of intentional discrimination." *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993). The predominance question is not whether a legislature desired legal compliance (which federal courts should encourage), or even whether it desired to enhance minority electoral opportunity (which they also should encourage). The question is whether race was the "motivation for placing a significant number of voters within or without a particular district." *Bethune-Hill*, 580 U.S. at 191. By February 1, the districts were largely in place, and Commissioner Kellom did not look to racial data in making her February 1 revisions. In fact, once she was done, commissioners deliberated over whether to review racial data and elected not to and instead submitted the plan for Dr. Palmer's Democratic primary analysis. 2/1/2024 Tr. at 41.

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After that, to a very limited degree, race may have entered the line drawing, but in a tailored and not predominant way. Dr. Palmer's analysis showed that MHD10 was on the cusp of becoming a performing opportunity district but would not presently provide that opportunity. 2/1/2024 Tr. 57. Determining that MHD10 "looks close" to performance, Commissioners first cured the split of the Moross-Morang neighborhood and made it whole in HD 10, moving 1,125 people, 2/1/2024 Tr. at 58-59, moved one township fragment of "77 people" from MHD10 to MHD12, *id.* at 58, and moved the Yorkshire Woods neighborhood containing 4,049 people from MHD12 to MHD10, *id.* at 61-62. The total number of individuals moves for arguable racial reasons, then, was 5,251, which is 5.7% of the ideal district population in a house plan.[15] The plan was sent "off for VRA analysis," 2/1/2024 Tr. at 62, and after it returned, Mr. Braden offered the opinion that MHD10 had become "a performing district," *id.* at 75. Commissioners ended their work.

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This tweak did not violate the Constitution for two reasons. First, race predominates only when "race was the predominant factor motivating the legislature's decision to place a *significant* number of voters within or without a particular district." *Miller*, 515 U.S. at 916 (emphasis added). Even assuming 5,251 persons were moved because of race, a change of just 5.7% of a district does not constitute on "the predominant motive for the design of the district as a whole." *Bethune-Hill*, 580 U.S. at 192.

Second, the use of race "was narrowly tailored to achieve compliance with" § 2. *Id.* at 193. Because the Court determined "that the elections in these districts are decided in the Democratic primaries, not the general election," and that a VRA analysis must incorporate

[15] Commissioners also moved a single VTD from MHD10 into MHD12 to correct a population imbalance. 2/1 Tr. 61-62; *Banerian v. Benson*, 597 F. Supp. 3d 1163, 1169 (W.D. Mich.), *appeal dismissed*, 143 S. Ct. 400 (2022) (three-judge court) ("a districting plan is like a Rubik's Cube: every adjustment requires still more adjustments"). The block was not chosen for racial reasons, and in any event, would bring the total to just 8,101 people moved.

"primary-election data," ECF No. 131 at 113, PageID.4816, Mr. Braden looked to turnout and voter-pool estimates in the Democratic primary to determine whether proposed districts would enable Black voters to constitute a majority in a Democratic primary. 1/29/2024 Tr. at 19-21, 25 (explaining methodology); 2/1/2024 Tr. at 56-58, 74-75 (analyses of Motown Sound). Plaintiffs expressly contend that MHD10 must be a performing opportunity district, *see* Obj. 18, PageID.5408, and the Commission "performed that kind of functional analysis" that Supreme Court precedent directs. *Bethune-Hill*, 580 U.S. at 194. Given that Plaintiffs proceeded beyond summary judgment on claims that voting in the Detroit area is polarized on racial lines, the Commission had "good reasons" to fear § 2 liability, *Cooper v. Harris*, 581 U.S. 285, 301 (2017), especially where expert analysis showed MHD10 would not perform, but was on the cusp of performance.

Perhaps most importantly, the Commission did not go "beyond what was reasonably necessary." *Shaw v. Reno*, 509 U.S. 630, 655 (1993) (*Shaw I*). It moved the bare minimum number of people necessary to enable Black voters in MHD10 to control Democratic primaries—and no more. In fact, the data showed that Black voters would *just* have an equal opportunity in that department (which is all § 2 requires). 2/1/2024 Tr. at 75; *see also* Palmer Remedial Rep. at ¶ 20. Plaintiffs' challenge to MHD10 and MHD12 stands in substantial tension with their renewed demand for ten majority-minority districts. Obj. 17-19, PageID.5407-5409. To make MHD10 majority-Black would have required significantly more race-based maneuvering, as Dr. Trende's analysis suggests. *See* Palmer Remedial Rep. at ¶ 21 (only 4% of Dr. Trende's simulated plans have ten or more majority-Black districts). But the Supreme Court in *Cooper* rejected the position that "whenever a legislature *can* draw a majority-minority district, it *must* do so." *Cooper*, 581 U.S. at 305. Here, the Commission was

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right to stop looking at race once it had reliable evidence that MHD10 would enable Black voters to control the Democratic primary.

II. Plaintiffs Do Not Prove a VRA Violation

There is no merit in Plaintiffs' assertion that Motown Sound is "Possibly in Violation of the Voting Rights Act." Obj. 17, PageID.5407 (boldface omitted).

A. For one thing, their arguments have "twisted the burden of proof beyond recognition." *Abbott*, 585 U.S. at 618. VRA § 2 "does not assume" the predicates of a claim; "plaintiffs must prove it." *Growe v. Emison*, 507 U.S. 25, 42 (1993). Plaintiffs present no VRA expert analysis and instead contend—falsely—that "Defendants have not shared any meaningful analysis demonstrating that" Motown Sound satisfies the VRA. Obj. 18, PageID.5408. That is not how burdens work, and Plaintiffs again appear to believe that, if they just say something "possibly" violates the law, the Court will do their own "lawyering for them." *Jeffries*, 965 F.3d at 860–61.

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B. Besides, the Commission has established compliance with § 2. Specifically, Plaintiffs challenge MHD10, MHD12, and MHD17. Obj. 18, PageID.5408; *see Gingles*, 478 U.S. 30, 59 n.28 (1986) (a challenge must be "district specific"). The Commission relied on highly probative evidence and legal opinion that these specific districts (and many others) will afford the Black community equal opportunity in Democratic primary elections. Indeed, Plaintiffs' VRA challenge to MHD10 demonstrates the Commission's compelling reasons to look at race in a very narrow manner to ensure compliance.

As described above, Mr. Braden determined that a district enabling Black voters to control the Democratic primary constitutes an opportunity district. Plaintiffs are wrong in their contention that this analysis turns on whether these districts perform as "supposed crossover districts." Obj. 19, PageID.5409. Although the Supreme Court has clearly held that

§ 2 can "be *satisfied by* crossover districts," *Cooper*, 581 U.S. at 305, the Commission need not rely on that doctrine here. Mr. Braden's framework looks to which racial group can control the Democratic primary on its own. If more Black than white voters participate in a Democratic primary in a given district, or more compose the primary pool, then a cohesive Black community can elect the candidates of its choosing *without a single white crossover vote*. Under these circumstances, a district below 50% BVAP may perform for Black voters in the Democratic primary, not because of help from white voters, but because many white voters do not participate in Democratic Party primaries. Mr. Braden's analysis therefore reliably gauges whether Black voters can elect candidates of their choosing "based on their own votes and without assistance from others." *Bartlett v. Strickland*, 556 U.S. 1, 14 (2009) (plurality opinion).

Plaintiffs do not challenge this analysis, even though Mr. Braden presented it in multiple public meetings. It is far superior to their analysis, which simply measures whether a district has a BVAP majority. *See* Obj. 18-19, PageID.5408-5409. The Supreme Court has condemned a mechanical reliance on BVAP percentages unsupported by analysis. *See, e.g.*, *Cooper*, 581 U.S. at 304-05; *Bethune-Hill*, 580 U.S. at 195-96; *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015). The Commission looked to "a functional analysis" of likely district performance, *Bethune-Hill*, 580 U.S. at 195, which fairly accounts for Plaintiffs' assertion that there is little white crossover voting in Democratic primaries, *see, e.g.*, 2.TR 80:3-13; PageID.2620. And that functional analysis looked to primary data, not general-election data, in satisfaction of this Court's liability ruling.

This reliable method reveals that MHD10, MHD12, and MHD17 satisfy § 2. Under the primary-pool metric, Black Democratic registered voters far outnumber white registered voters in MHD10 (37.3% to 26.3%), MHD12 (43.0% to 25.1%), and MHD17 (39.5% to

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25.9%). Palmer Remedial Rep. at ¶ 18, Tbl. 3; ECF No. 168-7, PageID.5498. Because "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground," *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994), evidence that Black Democratic registrants outnumber white registrants in a district thwarts Plaintiffs' § 2 claim. *Cf. Salas v. Southwest Texas Jr. College Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992) ("Obviously, a protected class is not entitled to § 2 relief merely because it turns out in a lower percentage than whites to vote."). Under the primary-turnout metric, each of these districts provides equal opportunity. In MHD12, Black turnout exceeds white turnout by 15.6 percentage points in 2018 and by 11.2 percentage points in 2022. Palmer Remedial Rep. at ¶ 13, Tbl. 2; ECF No. 168-7, PageID.5498. In MHD17, Black turnout exceeds white turnout by about 2 percentage points both years. *Id*. In MHD10, white and Black turnout are a virtual tie—with Black turnout exceeding white turnout in 2018 by 0.2% and falling behind white turnout in 2022 by 0.2%. *Id.* The VRA promises "equal political and electoral opportunity," *Johnson*, 512 U.S. at 1020, so an equal-turnout scenario satisfies its dictates. *Uno v. City of Holyoke*, 72 F.3d 973, 979 (1st Cir. 1995) ("the statutory scheme does not provide an assurance of success at the polls for minority candidates," but instead "an assurance of fairness"). All evidence shows that these districts comply with § 2. Because Plaintiffs have no contrary evidence, their challenge to fails.

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C. The same analysis defeats Plaintiffs' insistence that any plan without 10 majority-minority districts contravenes § 2. That assertion is rich coming from litigants criticizing the Commission for minor alterations to make MHD10 an equal-opportunity district: to configure 10 majority-BVAP districts would unquestionably require predominant consideration of race. In fact, Dr. Trende's simulation analysis shows that a race-blind

drawing process would only yield ten or more majority-Black districts in 4% of cases, beyond the 95th percentile Dr. Trende uses to suggest a gerrymander. Palmer Remedial Rep. at ¶ 21.

Regardless, the Supreme Court has rejected the idea that "whenever a legislature *can* draw a majority-minority district, it *must* do so." *Cooper*, 581 U.S. at 305. Here, Motown Sound exceeds the minority opportunity of a 10-majority-minority-district plan by providing 12 districts in which Black voters have at least an equal opportunity to control the Democratic primary—without any help from white crossover votes. Twelve beats ten. And it especially beats ten where it is the less-race-conscious option. *See Cooper*, 581 U.S. at 305. Even if Mr. Braden's projections of at least equal opportunity fail in two districts, Motown Sound will still deliver the same opportunity as Plaintiffs say § 2 requires. *Cf. Bartlett*, 556 U.S. at 23–24 (ratifying states' prerogative to create more performing districts below 50% minority VAP where majority-minority districts are possible).

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III. The Court Lacks Jurisdiction Over a State-law Claim Concerning Incumbency Protection, and the Commission Did Not Protect Incumbents

Plaintiffs' lead argument proposes that "incumbency neutrality was decidedly *not* the case" in Motown Sound. Obj. 10, PageID5400. This argument fails on many fronts.

A. The Court Lacks Jurisdiction Over Plaintiffs' State-Law Claim

Plaintiffs ask the Court to enforce the Michigan Constitution's prohibition on districts that "favor of disfavor an incumbent." Obj. 11, PageID.5401 (quoting Mich. Const. Art. IV § 6(13)(e)). But this Court lacks jurisdiction to enforce Michigan law against Michigan. "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 Sch. & Hosp.*

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. Legislative Black Caucus v. Alabama*, 988 F. Supp. 2d 1285, 1304 (M.D. Ala. 2013) (three-judge court) (Pryor, J., for the court).

Plaintiffs ask the Court to contravene that 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."). 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 832, 835 (6th Cir.), *cert. denied*, 142 S. Ct. 241 (2021). The official-capacity 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. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). The Court therefore lacks jurisdiction to enforce Michigan law against the Commission.

Moreover, the Supreme Court recently reversed a three-judge court's rejection of remedial districts on the ground that they "violated the North Carolina Constitution's ban on mid-decade redistricting, not federal law," concluding that the court could only enforce "federal law." *Covington*, 585 U.S. at 978–79. So too here.

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B. A Plan Need Not Purposefully Pair Incumbents To Cure Prior Violations

Plaintiffs attempt to give their state-law claim a federal flavor by insisting that incumbency protection "perpetuate[s] the discriminatory effect of the stricken plan." Obj. 11, PageID.5401. This is unfounded.

First, there is no federal constitutional problem with incumbency protection. In holding partisan-gerrymandering claims non-justiciable, the Supreme Court expressly held that a gerrymandering standard looking to incumbency protection is unmanageable. *See Rucho*

v. Common Cause, 139 S. Ct. 2484, 2501 (2019) ("If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional?"). To the extent Plaintiffs' argument is "a blood relative of" of a non-justiciable gerrymandering claim, it too is non-justiciable. *Banerian*, 589 F. Supp. 3d at 736.

Second, it is not true, as Plaintiffs suggest, that a plan will carry forward prior discriminatory intent unless incumbents are paired. Plaintiffs confuse different kinds of incumbency protection. In the cases they cite, the problem was not that remedial districts did not *pair* incumbents, but that the plans honored incumbents' "desire to retain the core of their districts" such that districts "largely maintain[ed] the same irregular structure [they] had under the Enjoined Plan." *Jacksonville Branch of NAACP v. City of Jacksonville*, No. 3:22-cv-493, 2022 WL 17751416, at *16 (M.D. Fla. Dec. 19, 2022); *see also Covington v. North Carolina*, 283 F. Supp. 3d 410, 431 (M.D.N.C.), *aff'd in part, rev'd in part*, 585 U.S. 969 (2018) ("efforts to protect incumbents *by seeking to preserve the "cores" of unconstitutional districts* or through reliance on political data closely correlated with race . . . have the potential to embed, rather than remedy, the effects of an unconstitutional racial gerrymander" (emphasis added)).

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But Plaintiffs do not allege that type of incumbency protection here. Their sole assertion of fact is that Motown Sound "managed not to double-up incumbents in even a single district." Obj. 10, PageID.5400. But the non-pairing of incumbents does not mean district cores were retained. As shown, Motown Sound entirely upends district cores and does not carry forward the basic configurations of the enjoined districts. Rodden Remedial Rep. at 4-7 & Tbl. 2, App'x Tbl. 2. Accordingly, Plaintiffs' assertion about pairing means nothing. Indeed, their assertion would suggest the Commission must *violate* the Michigan Constitution to cure a racial gerrymander, as the Constitution forbids districts that "disfavor an

incumbent." Mich. Const. Art. IV § 6(13)(e). Under Plaintiffs' baffling view, the Commission would have to *purposefully pair* incumbents to cure racial gerrymandering.

C. The Commission Did Not Avoid Incumbent Pairings

Plaintiffs are flat wrong on the facts. To prove a violation of the Michigan Constitution, Plaintiffs must prove a purposeful act by the Commission in not pairing incumbents. They fail.

Intent is evaluated by "circumstantial and direct evidence." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Plaintiffs acknowledge they have no direct evidence that the Commission purposefully avoided incumbent pairings. They admit the only record references to incumbency consists of commissioners stating they "did *not* favor or disfavor incumbents." Obj. 9, PageID.5406. That is an odd way to begin an effort to show purposeful incumbent protection.[16]

That leaves circumstantial evidence. But Plaintiffs do not establish that commissioners had incumbency-address information. That leaves Plaintiffs in the unenviable position of proving how commissioners could have geolocated incumbents' home addresses to ensure they kept incumbents in separate districts. On that, Plaintiffs are silent. As described above, their theory that an individual commenter (Mr. Gilmer-Hill) drew Motown Sound is simply wrong.

Another key type of circumstantial evidence is "a clear pattern, unexplainable on grounds other than" a given motive. *Arlington Heights*, 429 U.S. at 266. For example, if a government actor enforces a law only against members of one racial group, invidious intent

[16] Plaintiffs criticize these assertions as being tendered "quite awkwardly." Obj. 9, PageID.5399. They miss that commissioners made open certifications that they complied with all relevant legal criteria, given the inevitable judicial scrutiny of their work. They made certifications that they did not consider incumbency alongside their certifications about communities of interest and other requirements. *See, e.g.*, 2/1/2024 Tr. at 76-78.

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might be proven by that pattern. *See id.* (citing iconic cases like *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)). But Plaintiffs admit the pattern evidence is against them: "most of the Commission's draft remedial maps pitted incumbents against each other." Obj. 10, PageID.5400. Commissioners had a pattern of *not* avoiding incumbency pairings, which signals that they bore no incumbency-protection purpose. *See also* Rodden Remedial Rep. at 11 (concluding that fact that seven of ten proposed plans paired at least one set of incumbents meant "[i]f the Commission set out to avoid incumbent pairing, it seems to have done a very poor job"). Plaintiffs do not explain how the *same people* who drew seven maps that paired incumbents suddenly arrived at an incumbency-protection purpose for Motown Sound.

Ultimately, Plaintiffs' effort to overcome the presumption of good faith amounts to nothing but a bald assertion that avoiding pairings was improbable. Obj. 10-11, PageID.5400-01. They stake their position on Dr. Trende's simulation analysis, but this has many flaws that the Supreme Court recently explicated and have been discussed *supra* at § I(A)(3)(b). *See Allen v. Milligan*, 599 U.S. 1, 33-34 (2023). As Dr. Rodden explains, Dr. Trende's approach "pa[id] no attention to the Detroit neighborhood maps over which the commissioners agonized," and his simulations were "allowed to cut across Detroit neighborhoods with impunity—an option that was not considered by the commissioners." Rodden Remedial Rep. at 11. As Figure 3 of Dr. Rodden's report depicts, "the redrawn district boundaries [in Motown Sound] very frequently keep Detroit neighborhoods together:"

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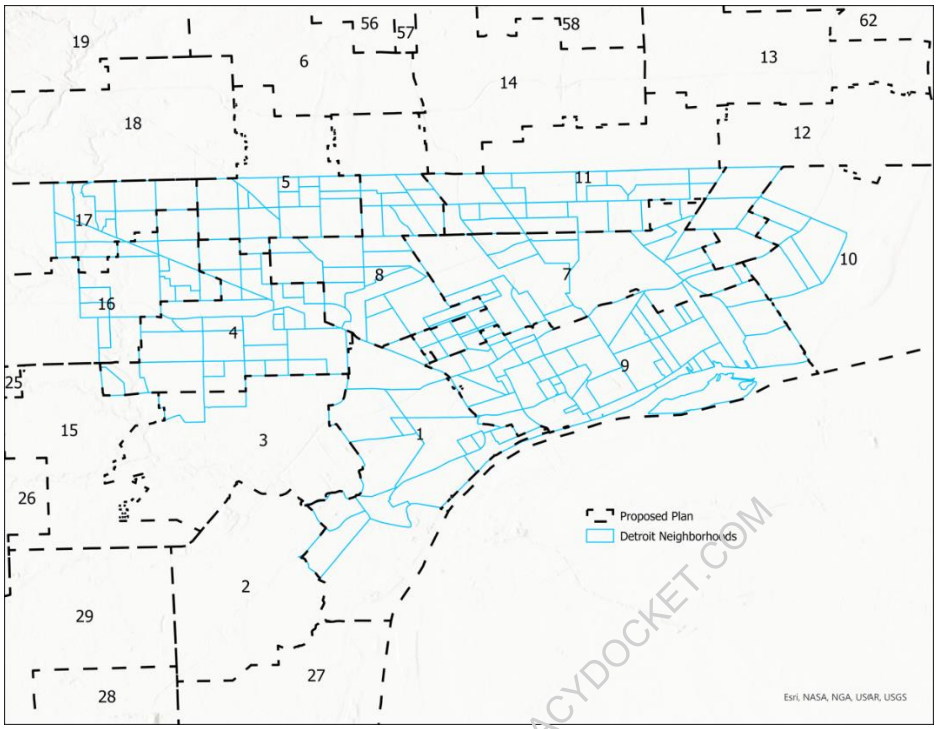
Figure 3: Commission Remedial Plan Boundaries and Detroit Neighborhoods



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Id. at 11-12, Fig. 3. Dr. Trende's simulations also did not take into account the public's community-of-interest advocacy:

> The simulations also did not take into account the very strong and sometimes passionate claims made at public meetings about communities of interest, including Hispanic/Latino voters in the vicinity of District 1, and the arrangement of MENA or Arab voters in the vicinity of Districts 13 and 15, or specific claims made about which Detroit neighborhoods and small municipalities belong together in the vicinity of Districts 5, 6, and 8, or Districts 11 and 14.

Id. at 12.

Finally, Dr. Trende departed from the "standard practice" of "hold[ing] fixed the same municipalities that were not split by the district-drawers," *id.,* setting up "one set of simulations for comparison with all *other* plans" and fixing only those municipalities "consistently held fixed in *all* the other plans. . ." *Id.* (noting that an exception is the Szetela Plan, which "gets its own bespoke set of simulations"). Due to these flaws (and others

described in Dr. Rodden's report), "Trende's simulations are not a useful baseline for comparison" to Motown Sound. *Id*. "The specific municipalities and Detroit neighborhoods that were preserved and combined by the commissioners likely had an impact on the probability of the emergence of incumbent pairings." *Id.* Because Dr. Trende's simulated plans are not appropriate comparator maps, any conclusions he draws based on a comparison between Motown Sound and his simulated plans concerning incumbency protection are not valid.

Dr. Rodden's concerns are borne out by examination of where incumbents reside. There are good reasons why a plan drawn blind to incumbent addresses would not pair them. Dr. Trende contends that Reps. Weiss, Price, Scott, and McFall should have been paired, Trende Remedial Rep. at 12, PageID.5428, but they all reside in different Detroit neighborhoods, *see* Rodden Remedial Rep. at 13-15 & Figs. 4B, 4D. The same is true of Reps. Paiz, Edwards, and Xiong, Trende Remedial Rep. at 12, PageID.5428. This analysis fails to consider that Rep. Paiz resides in Harper Woods and Rep. Edwards resides in Eastpointe, which were not paired. Rodden Remedial Rep. at 15-16 & Fig. 4E. And Rep. Xiong resides in Warren, a different community. *Id*. Plaintiffs, in short, have proven nothing.

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CONCLUSION

The Court should reject Plaintiffs' request to enjoin Motown Sound and declare that the Secretary of State may implement the plan for the 2024 elections and beyond.

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Respectfully submitted,

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