No. 22-92

In the
Supreme Court of the United States

MICHAEL BANERIAN, ET AL.,
Appellants,
v.
JOCELYN BENSON, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF MICHIGAN, ET AL.,
Appellees.

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

MOTION TO DISMISS OR AFFIRM OF THE MEMBERS OF THE MICHIGAN INDEPENDENT CITIZENS REDISTRICTING COMMISSION

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QUESTION PRESENTED

Whether Appellants are entitled to a preliminary injunction pending trial of their one-person, one-vote claim.

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STATEMENT

This is an appeal from a three-judge district court's order declining to issue temporary injunctive relief effective for the 2022 elections. Appellants contend that the congressional redistricting plan adopted by the Michigan Independent Citizens Redistricting Commission (the Commission) is unconstitutionally malapportioned because the population deviation between the largest and smallest districts is 1,122 residents or 0.14% of an ideal district. That is less than one-fifth the size of the deviation this Court unanimously approved in *Tennant v. Jefferson County Commission*, 567 U.S. 758 (2012) (per curiam). This Court has neither invalidated nor affirmed invalidation of a congressional plan with such a small departure from the mathematical ideal. The court below correctly applied *Tennant*'s four-part test in finding the deviation likely to be justified by Michigan's important interests, and it correctly "afford[ed] appropriate deference to [the Commission's] reasonable exercise of its political judgment," *id.* at 759.

This Court, however, need not address that sound holding to summarily resolve this appeal. Appellants sought provisional relief for the 2022 elections, but the request is moot now that those elections have commenced and will be completed under the challenged plan. Appellants no longer have a colorable claim of irreparable harm and are not entitled to a preliminary injunction. The Court should summarily dismiss this appeal or affirm the order below.

A. Factual Background

1. For most of Michigan's history, redistricting was the province of the State Legislature and, when it deadlocked, the courts. This regime enabled politicians and their partisan allies to prepare redistricting plans in secret, without public input, and for narrow interests, as a federal court found occurred in 2011, *see League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867, 882–93 (E.D. Mich.), *vacated sub nom. Chatfield v. League of Women Voters of Mich.*, 140 S. Ct. 429 (2019).

That changed in 2018, when "voters in . . . Michigan approved [a] constitutional amendment[] creating [a] multimember commission[] that [is] responsible . . . for creating and approving district maps for congressional and legislative districts." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (citing Mich. Const. art. IV, § 6). The amendment vests redistricting authority with the Commission, which is composed of 13 registered voters, randomly selected by the Secretary of State, four of whom identify as Republicans, four of whom identify as Democrats, and five of whom affiliate with neither major party. Mich. Const. art. IV, § 6(2)(f). Individuals who in the past six years were registered lobbyists, elected officials, candidates, employees of officials or candidates, or certain relatives of officials or candidates are ineligible for membership. *Id.* art. IV, § 6(1)(b) and (c); *see Daunt v. Benson*, 999 F.3d 299, 304 (6th Cir. 2021). The amendment is codified in a constitutional article titled "Legislative Branch," Mich. Const. art. IV, and declares that "the powers

granted to the commission are legislative," *id.* art. IV, § 6(22).

2. The amendment directs the Commission to implement seven redistricting criteria in descending "order of priority." Mich. Const. art. IV, § 6(13). These include that districts comply with federal law, be contiguous, "not provide a disproportionate advantage to any political party," "not favor or disfavor an incumbent elected official or a candidate," and "reflect consideration of county, city, and township boundaries." *Id.* The third-ranked criterion dictates that "[d]istricts shall reflect the state's diverse population and communities of interest," which "may include, but shall not be limited to, populations that share cultural or historical characteristics or economic interests." *Id.* art. IV, § 6(c).

This criterion was a central plank of the ballot initiative. The sponsoring organization Voters Not Politicians (VNP) argued that districts should be built around "what interests citizens feel bind them together with others—whether it be economic, historical, ethnic, or other interests."[1] VNP represented that the amendment would enable residents to "tell the Commission how they want their communities defined through a series of public hearings." Dist.Ct.Dkt.42-3 at 3.

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[1] Voters Not Politicians, How will the Commission draw the maps?, 2019–2021 Implementation Archives, https://votersnotpoliticians.com/implementation-archive/ (last visited Sept. 27, 2022).

As promised, the amendment facilitates public input. The Commission must hold at least ten public hearings "throughout the state" before drafting plans, conduct at least five more after initial drafting, and publish any plan that will be proposed for adoption in a 45-day notice-and-comment process. Mich. Const. art. IV, § 6(8), 6(9), and 6(14)(b). The Commission must, in addition, "conduct all of its business at open meetings" and "in a manner that invites wide public participation throughout the state," and it must "provide contemporaneous public observation and meaningful public participation," including by remote means. *Id.* art. IV, § 6(10); *see Detroit News, Inc. v. Indep. Citizens Redistricting Comm'n*, 976 N.W.2d 612, 620–29 (Mich. 2021).

3. The Commission convened its inaugural session in September 2020. J.S.App.241a. Despite the pandemic-caused delay in release of the census results, the Commission surpassed the constitutional standard for public input. It held at least 139 hearings and received about 25,000 comments through its online portal. J.S.App.220a, 241a.

The congressional plan the Commission ultimately adopted was named the "Chestnut" plan and was drafted principally by Commissioner Anthony Eid, one of the unaffiliated commissioners. J.S.App.220a, 241a. The district court found that the Chestnut plan was "animated by a principle of self-determinism: public comments on the various plans . . . drove the Commission to recognize . . . particular communities of interest in different parts of the State—which in turn led the Commission to draw

the district lines as it did." J.S.App.243a. In November 2021, the Chestnut plan was published for public review and comment along with four other proposed congressional plans. J.S.App.241a. The thrust of public commentary on it was favorable. J.S.App.140a.

The districts in all published congressional plans were of substantially equal population, but varied slightly from the ideal district size of 775,179 residents, resulting in total-population variances in the respective plans ranging from 0.14% to 0.48% of the ideal. J.S.App.210a, 242a. The Chestnut plan had the lowest deviation of the five (1,122 residents or 0.14%), J.S.App.239a, 242a, with districts ranging from 635 residents below the ideal to 487 residents above the ideal, J.S.App.221a; *see also* Dist.Ct.Dkt.61-11 at 171. The total population of Michigan exceeds 10 million. J.S.App.210a.

The Chestnut plan obtained broad support within the Commission, as 11 of 13 commissioners picked it as either their first or second choice, and the Commission adopted it on December 28, 2021, by an 8-to-5 vote. "[T]wo Democratic, two Republican, and four independent commissioners vot[ed] in favor of the Plan." J.S.App.241a–42a.

B. Procedural Posture

1. On January 20, 2022, Appellants, who are seven Michigan voters, filed this case against the Commission's members and the Michigan Secretary

of State in their official capacities.[2] A three-judge court comprising one circuit judge (Kethledge, J.) and two district-court judges (Maloney and Neff, JJ.) was convened to adjudicate this lawsuit. *See* 28 U.S.C. § 2284(a). VNP and a group of voters intervened as defendants. *See* J.S.App.217a–20a.

The operative complaint contains two claims. Count I asserts that, because of its small population variance, the Chestnut plan violates the equal-population rule of Article I, Section 2 of the Constitution. J.S.App.20–21a. Count II alleges that the Commission "arbitrarily and inconsistently applied the phrase 'communities of interest'" and that, by consequence, the Chestnut plan violates the Fourteenth Amendment. J.S.App.24a. Appellants contend that the only communities of interest recognized in Michigan law are "counties, cities, and townships." *Id.*

On January 27, 2022, Appellants moved for a preliminary injunction, arguing that "the 2022 Midterm Elections are 285 days away" and "irreparable injury . . . will arise on November 8, 2022 if [the alleged] violations are not remedied." Dist.Ct.Dkt.9 at 36; *see also id.* at 15 ("Once the November 2022 Midterm Elections arrive, the injury exacted . . . will petrify into a permanent, irreparable harm that money

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[2] Because "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, 166 (1985) (citation omitted), this motion refers to the Commission and its members interchangeably.

damages cannot fix."). Appellants then moved for expedited consideration, calling this "necessary to avert imminent mootness of the relief requested." Dist.Ct.Dkt.20 at 1; *see also id.* at 2 (stating that denial of the request "risks mootness," because "Michigan's election machinery is proceeding at a rapid pace"). The district court "granted that motion in substantial part," ordering expedited briefing and scheduling a hearing for March 16. J.S.App.243a. "The next day," Appellants moved for further expedition on the same grounds, but the district court "denied that motion." *Id.*

2. Appellants submitted an alternative configuration of Michigan's 13 congressional districts, achieving equal district population within a single person of the ideal. *See* J.S.App.28a, 38a. The expert Appellants hired to evaluate the plan did not conduct an "assessment of . . . communities of interest." J.S.App.36a. Instead, the expert considered splits of "Counties, Townships, and Villages." J.S.App.40a. Appellants argued that, because "counties, cities, and townships form the primary communities of interest" recognized under Michigan law, the alternative demonstrated that the Commission could have better adhered to this criterion—as Appellants defined it—in a plan with near-perfect mathematical equality. Dist.Ct.Dkt.9 at 25.

The Commission presented a declaration of Commissioner Eid. J.S.App.243a. The declaration addresses each of the Chestnut plan's 13 congressional districts, identifies discrete communities the Commission intended to group within each district,

and explains how public commentary informed these choices. J.S.App.139a–48a. Commissioner Eid attested that he "never saw a plan that achieved the communities-of-interest goals of the Chestnut plan at a lower population deviation" and does "not know how the Commission would have achieved all the communities-of-interest goals of the Chestnut plan at a lower population deviation." J.S.App.148a. The declaration also identifies numerous respects in which Appellants' alternative plan dismantles the Commission's communities-of-interest choices. J.S.App.139a–48a. Appellants eventually conceded this latter point, admitting the effect of their alternative was "to destroy [the Commission's] map and redo [that] map." Supp.App.15a.

Appellants, however, contested Commissioner Eid's characterization of public comments, insisting the declaration was "a post-hoc justification for the district lines in response to litigation." Dist.Ct.Dkt.53 at 6. The district court then asked the parties "[w]hether limited, expedited discovery before the March 16, 2022, hearing date is desired by any party." Dist.Ct.Dkt.55 at 2. Appellants responded that they sought no discovery, as did the other parties. J.S.App.225a.

3. On March 4, the district court dismissed Count II. J.S.App.232a–38a. The claim, it held, is "a blood relative of the claims of partisan gerrymandering that the Supreme Court found nonjusticiable in *Rucho v. Common Cause,* 139 S. Ct. 2484, 2506–07 (2019)." J.S.App.232a–33a. The court found that "no principle discernible in the Constitution can direct a

court's decision as to when" the "fragmentation" of communities of interest "'has gone too far.'" J.S.App.236a (quoting *Rucho*, 139 S. Ct. at 2497).

The court noted that, in addition to Fourteenth Amendment arguments, Appellants "allege in conclusory fashion that 'Michigan's true communities of interest'" are "'counties.'" J.S.App.237a (quoting J.S.App.24a). But the court found this "plainly untrue, given that, under the Michigan Constitution, county lines are expressly part of a different (and lower-ranked) criterion altogether; and the 'communities of interest' criterion itself provides that such communities 'may include, but shall not be limited to, populations that share cultural or historical characteristics or economic interests.'" *Id.* (quoting Mich. Const. art. IV, § 6(13)(c) and (f)).

Appellants do not challenge this ruling. *See* J.S. 4.

4. The preliminary-injunction hearing proceeded on Count I. Appellants' counsel acknowledged that their alternative plan was crafted to support Count II, Supp.App.15a–16a, and that, "because this Court has dismissed Count Two, . . . we have conceded that our original remedy map is not—should not factor into this Court's consideration," Supp.App.48a; *see also* Supp.App.20a (similar concession). Appellants' counsel then represented for the first time that "we could come up with a least changes map" to show that "it is practicable to respect even Commissioner Eid's asserted communities of interest and equalize the populations among these districts." Supp.App.49a–50a. The district

court denied this request. Supp.App.55a; J.S.App.248a.

The district court did, however, seek additional submissions concerning Appellants' criticisms of Commissioner Eid's declaration, asking the parties for "specific citations to the Commission's record for every single public comment that they thought supported or refuted, respectively, Eid's representations in his declaration." J.S.App.243a. In response, the Commission "submitted a 787-page appendix, which included copies of 546 comments that, the [Commission] said, supported Eid's representations." *Id.* "The [Appellants], for their part, claimed that 199 comments refuted Eid's representations, for which they provided citations (usually by way of '*see, e.g.*' cites) for only 59." *Id.*

5. On April 1, the district court unanimously denied the preliminary-injunction motion on two grounds. J.S.App.253a.

First, the court found that Appellants are unlikely to succeed on Count I. J.S.App.244a–50a. Applying the framework this Court announced in *Karcher v. Daggett*, 462 U.S. 725 (1983), and *Tennant*, the court assumed the Commission bore the burden "to 'show with some specificity' that the population differences 'were necessary to achieve some legitimate state objective.'" J.S.App.245a (quoting *Karcher*, 462 U.S. at 741). Accordingly, it applied *Karcher*'s four-part test for assessing whether variances are justified, examining "the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those inter-

ests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." *Id.* (quoting *Karcher*, 462 U.S. at 741).

The court found that "all four factors" favored the Commission and three were not in dispute. J.S.App.245a–48a. As to the uncontested factors, the court found that "the Chestnut Plan's 0.14% deviation is small," being one-fifth the size of the deviation upheld in *Tennant*, J.S.App.245a; that the goal of preserving communities of interest is "undisputedly legitimate," as "[Appellants] agree," J.S.App.246a; and that there is no "alternative plan that would preserve the 'interests' identified by the Commission" with a lower deviation, since Appellants' "own plan does not preserve those communities of interest or even attempt to." J.S.App.248a (citation omitted).

On the contested question whether the Commission "consistently" applied this goal, the court examined the record and answered in the affirmative. J.S.App.246a–47a. The court concluded that consistency does not require "the '*same* communities-of-interest objective'" to be honored in each district, because, "in different districts, different types of communities might predominate," and "tradeoffs" are unavoidable. J.S.App.247a. It was sufficient that "the Plan is consistent throughout in its emphasis on communities of interest in comments submitted to the Commission." J.S.App.247a–48a. And the court found "the overwhelming weight of the record . . . supports the Commission's judgment." J.S.App.250a. The court reviewed the Commission's appendix of

public comments and found that at least "298 of those comments are plainly supportive of the Commission's determinations," whereas Appellants identified "only 31" comments that cut against those determinations. *Id.*

Second, the court found that "[t]he public interest supports allowing the upcoming congressional election to proceed with the districting plan drawn in the manner that Michigan's Constitution now prescribes." J.S.App.251a. The court reasoned that "the people of Michigan have exercised their power to prescribe for their state government—rather than having their state government prescribe for them—the manner in which the lines for congressional districts shall be drawn in this State." *Id.* Departing from the plan produced through that process was not, it held, in the public interest.

6. Appellants did not seek emergency relief in this Court. They appealed 28 days later. J.S.App.1a. They then obtained an unopposed 30-day extension to file their jurisdictional statement, J.S.App.254a–61a, which they subsequently filed 118 days from the district court's April 1 order, after the Court's October 2021 Term ended. Michigan conducted its congressional primary under the Chestnut plan on August 2 and is at an advanced stage of preparations for the November general election.

REASONS FOR GRANTING THE MOTION

Appellants renew their contention that the Chestnut plan's slight deviation from perfect mathematical equality violates the equal-population rule.

But they appeal from an order denying temporary relief for the 2022 congressional elections, that request is moot, and the jurisdictional statement fails to show that Appellants are likely to suffer irreparable harm before judgment without provisional relief. Further, the jurisdictional statement does not challenge the district court's alternative holding on the public-interest element. Summary disposition is compelled on each of these bases alone.

Appellants also cannot show a likelihood of success on the merits. The district court applied the four-part test prescribed in this Court's precedent, three of the factors are not in dispute, and the fourth was resolved against Appellants on a robust evidentiary record. Appellants' arguments are variations on the basic theme that federal courts should not defer to state legislative policies in one-person, one-vote claims. But this Court has repeatedly rejected that argument and should here as well.

I. Appellants Show No Equitable Entitlement to a Preliminary Injunction.

Appellants cannot establish the equitable predicates to temporary relief. They no longer have a colorable claim of irreparable harm and do not challenge the district court's alternative holding on the public-interest factor.

A. "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). This "Court has repeatedly held that the basis for injunc-

tive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Accordingly, a plaintiff "must demonstrate a likelihood of irreparable injury—not just a possibility—in order to obtain preliminary relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008). Appellants cannot make "*a clear showing*" of this. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted).

As in all malapportionment cases, Appellants advance their "interest in maintaining the effectiveness of their votes." *Baker v. Carr*, 369 U.S. 186, 208 (1962) (citation omitted); *see* J.S. 15. That interest risks impairment during an election, when "votes" are "counted." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Accordingly, Appellants made "clear" below that "the injury" necessitating temporary relief was voting "in the upcoming election" under the Chestnut plan. Dist.Ct.Dkt.49 at 10. They sought expedition as "necessary to avert the imminent mootness of the relief requested" and warned that delay "risks mootness" because "Michigan's election machinery is proceeding at a rapid pace." Dist.Ct.Dkt.20 at 1–2. This was their asserted "irreparable injury." Dist.Ct.Dkt.9 at 36; *see also id.* at 14–15.

As Appellants predicted, that claim is now moot. "In general, an appeal from the denial of a preliminary injunction is mooted by the occurrence of the action sought to be enjoined." *Knaust v. City of Kingston*, 157 F.3d 86, 88 (2d Cir. 1998) (citation omitted); *see also Matos ex rel. Matos v. Clinton Sch.*

Dist., 367 F.3d 68, 72 (1st Cir. 2004) (Selya, J.) (same). Michigan conducted its 2022 congressional primary under the Chestnut plan, and Appellants cannot now obtain relief for the November 2022 election, given that "[t]his Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam); *Purcell v. Gonzalez*, 549 U.S. 1, 4–6 (2006) (per curiam); *see Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring). Because this Court "lacks the power to turn back the clock" and conduct the 2022 elections under a different redistricting plan, *Matos*, 367 F.3d at 72, Appellants' asserted irreparable injury can no longer be remedied. Appellants effectively conceded this by declining to seek emergency relief in April 2022 and waiting 118 days to perfect this appeal.

To be sure, this "case as a whole remains alive" because the State will use the Chestnut plan for the remainder of the decade without court intervention or additional acts of the Commission. *See Camenisch*, 451 U.S. at 394. But "the only issue presently before" this Court is "the correctness of the decision to [deny] a preliminary injunction." *Id.* The fate of the Chestnut plan for future elections "must be resolved in a trial on the merits." *Id.* at 396.

At this stage, it is dispositive that Appellants are not "likely to suffer irreparable harm before a decision on the merits can be rendered." *Winter*, 555 U.S. at 22 (citation omitted). With reasonable diligence,

Appellants can shepherd this case to a final judgment well before the next regular congressional elections in 2024. The mere chance of a special election before then is insufficient to establish "that irreparable injury is *likely* in the absence of an injunction," not merely "a possibility." *Id.* Michigan has seen only three special congressional elections in the past 30 years.[3] And there is no basis to surmise that any special election that might occur before final judgment would occur in a district where one of the Appellants resides. *Cf. Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018).

This is a sufficient basis "to summarily reject [the] appeal," either through affirmance, *Matos*, 367 F.3d at 74, or dismissal, *Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 29 (2d Cir. 1983); *cf. Winter*, 555 U.S. at 376 (directing courts to "reconsider the likelihood of irreparable harm in light of" changed circumstances). Although the district court did not cite, and could not have cited, this ground as the basis for denying the motion, "an appellee may rely upon any matter appearing in the record in support of the judgment below." *Blum v. Bacon*, 457 U.S. 132, 137

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[3] *See* 19 Fed. Election Comm'n Record 10, at 6 (Oct. 1993), https://www.fec.gov/resources/record/1993/october1993.pdf (1993 special election CD3); Fed. Election Comm'n, Michigan Special Election Reporting: 11th district (2012), (Jul. 27, 2012), https://www.fec.gov/updates/michigan-specialelection-reporting-11th-district/ (2012 special election CD11); Mich. Dep't of State, 2018 Election Results (Nov. 26, 2018), https://mielections.us/election/results/2018GEN_CENR.html# (2018 special election CD13).

n.5 (1982); *accord Union Pac. R. Co. v. Bhd. of Locomotive Engineers & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 80 (2009).

B. Appellants also cannot establish that the public interest favors an injunction and have forfeited any argument to that effect. Appellants bore the burden below to show that an "injunction is in the public interest." *Winter*, 555 U.S. at 20. This, again, is because "[t]he purpose of . . . interim equitable relief is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (citing *Camenisch*, 451 U.S. at 395). "An injunction . . . does not follow from success on the merits as a matter of course," *Winter*, 555 U.S. at 32, and "a court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff," *Romero-Barcelo*, 456 U.S. at 312–13.

Cognizant of its equitable discretion, the district court determined that "[t]he public interest supports allowing the upcoming congressional election to proceed" under "the Chestnut Plan." J.S.App.251a. It concluded this because "the people of Michigan have exercised their power to prescribe for their state government—rather than having their state government prescribe for them—the manner in which the lines for congressional districts shall be drawn in this State." *Id.* The State Constitution creates a reticulated redistricting process—founded on transparency and public input—and it forbids "any body,

except" the Commission from redistricting. Mich. Const. art IV, § 6(19). For a court to impose a plan presented by private litigants or a plan of its own design, as Appellants requested, *see* Dist.Ct.Dkt.9 at 36, would "condemn" the "complaints" of Michiganders "about districting to echo into a void." *Rucho*, 139 S. Ct. at 2507.

The jurisdictional statement and its question presented do not mention this alternative ruling, much less establish that the district court abused its discretion. That omission is fatal. "Only those questions set out in the" jurisdictional statement, "or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a); *see* Sup. Ct. R. 18.3 (applying Sup. Ct. R. 14 to jurisdictional statements); *see, e.g.*, *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645–46 (1992). The question presented is whether "a state [may] justify deviations" in district populations under "an ambiguous and open-ended criterion." J.S. (i). Resolving that question does not resolve whether the district court abused its discretion as to the public-interest factor, which presents an independent inquiry. *See Winter*, 555 U.S. at 31 n.5; *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("Even if we assume . . . that plaintiffs were likely to succeed on the merits of their claims, the balance of equities and the public interest tilted against their request for a preliminary injunction."). Because the order below stands on this ground alone, the Court should

dismiss for lack of a substantial federal question or summarily affirm.[4]

II. Appellants Are Not Likely to Succeed on the Merits.

Appellants cannot show a likelihood of success on the merits. The Chestnut plan's population deviation is small, and the district court correctly heeded this Court's command to "defer to . . . state legislative policies" in assessing justifications for a minor population variances. *Tennant*, 567 U.S. at 760 (quoting *Karcher*, 462 U.S. at 740). Appellants' contentions against that deference stand foreclosed in this Court's precedent, have no foundation in law or the evidentiary record, and warrant no further review.

A. The District Court Correctly Applied the Governing Standard.

1. This Court's precedent reads Article I, § 2, to prohibit states from using "districts containing widely varied numbers of inhabitants." *Wesberry*, 376 U.S. at 8. This precedent is equally clear that the "standard does not require that congressional districts be drawn with 'precise mathematical equality.'" *Tennant*, 567 U.S. at 759 (quoting *Karcher*, 462 U.S. at 730).

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[4] The Commission argued below that a new redistricting plan is improper temporary relief, because it does not "preserve the relative positions of the parties" pending trial. *Camenisch*, 451 U.S. at 395. The Commission will press this argument if this appeal progresses past this stage, but the Court need not reach it to issue a summary disposition.

Instead, where a challenger makes a *prima facie* showing that population differences "'could practicably be avoided,'" the state may justify them by "'show[ing] with some specificity' that the population differences 'were necessary to achieve some legitimate state objective.'" *Id.* at 760 (quoting *Karcher*, 462 U.S. at 734, 740, 741). "This burden is a 'flexible' one," which calls for an inquiry into four factors: "[1] the size of the deviations, [2] the importance of the State's interests, [3] the consistency with which the plan as a whole reflects those interests, and [4] the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." *Id.* (quoting *Karcher*, 462 U.S. at 741).

Applying that framework, this Court in *Tennant* stayed and then summarily reversed a district-court order, issued after trial, enjoining a West Virginia congressional plan with a population deviation of 4,871 residents or 0.79%. *Id.* at 762–63. The Court found the deviation from mathematical equality was "small" and that "three" state policies justified it: "[t]he desire to minimize population shifts between districts," "avoiding contests between incumbents," and "not splitting political subdivisions." *Id.* at 764–65. No "alternative plan[] came close to vindicating all three of the State's legitimate objectives while achieving a lower variance," as each of the alternatives of perfect equality "failed to serve at least one objective." *Id.* at 765.

The district court in *Tennant* had quarreled with the legislature's goals, such as by "question[ing] the

State's assertion that [the plan] best preserved the core of existing districts." *Id.* at 762. This Court rejected that approach, recognizing that "redistricting 'ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment.'" *Id.* at 760 (citation omitted). District courts must "defer" to those "policies," not substitute their own preferences. *Id.* (quoting *Karcher*, 462 U.S. at 740).

2. The district court correctly applied this template to the preliminary-injunction record and correctly found that "the Commission is very likely to carry [its] burden in this case."[5] J.S.App.249a. Appellants neither mention the governing test nor attempt to show error by the district court in applying it. In fact, it is beyond contest that three of the four governing factors favor the Commission.

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[5] The district court "assume[d] for purposes of argument" that Appellants made the *prima facie* showing to shift the burden, J.S.App.245a, and this Court may as well at this stage. The Commission, however, will challenge this assumption, as it did below, if this appeal progresses. First, Appellants' alternative neither complies with Michigan law nor was before the Commission during the redistricting, as was the case in *Karcher*, 462 U.S. at 738, and *Tennant*, 567 U.S. at 760–61. Second, Appellants failed to show that their alternative is an improvement, because, for the first time, the Census Bureau implemented a policy called "differential privacy," which "injects a calibrated amount of noise into the raw census data to control the privacy risk of any calculation or statistic." *Alabama v. U.S. Dep't of Commerce*, 546 F. Supp. 3d 1057, 1064 (M.D. Ala. 2021). The purposeful inaccuracy of the census numbers renders further "tinkerings" "futile." *Abrams v. Johnson*, 521 U.S. 74, 100 (1997).

First, there can be no question that a 0.14% deviation is "small" when the 0.79% deviation deemed small in *Tennant* "was more than five times bigger." J.S.App.245a. The Chestnut plan had the smallest deviation of any plan eligible for the Commission's adoption, and this Court has never invalidated, nor affirmed invalidation of, a congressional plan with such a small deviation.

Second, there can be no doubt that Michigan's communities-of-interest goals are important. This Court held in *Abrams* that "maintaining . . . communities of interest" "support[ed]" the "slight deviations" from district equality in a court-fashioned congressional plan. 521 U.S. at 99–100. That holding obtains here all the more given that "[c]ourt-ordered districts are held to higher standards of population equality than legislative ones." *Id.* at 98. And it follows more generally from this Court's redistricting precedents, which have recognized "respect for communities of interest" as a "traditional redistricting factor[]," *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 795 (2017), and consistently encouraged states to configure districts "defined by actual shared interests," *Miller v. Johnson*, 515 U.S. 900, 916 (1995), broadly conceived to include residents' "age, education, economic status, [and] the community in which they live," *Shaw v. Reno*, 509 U.S. 630, 647 (1993). Yet again, there is no serious contest on this element: as the district court recognized, Appellants "agree that the preservation of such communities is a 'traditional districting criterion' employed by more than 20 states."

J.S.App.246a (quoting Dist.Ct.Dkt.9 at 20) (alteration accepted).

Further, the Michigan public had a uniquely compelling basis to adopt this communities-of-interest criterion and its interrelated public-comment process. Michigan recently experienced redistricting by political consultants who prepared plans "in a secure location to which nobody else had access" under directives from "redistricting meetings [that] remained secret" and from Washington, but not from the State's voting public. *See League of Women Voters*, 373 F. Supp. 3d at 886–89. The constitutional communities-of-interest criterion, informed by public input, is tailored to correct a specific, negative, and quite recent episode of Michigan's history.

The fourth factor, "the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely," *Karcher*, 462 U.S. at 741, is likewise uncontested. Although Appellants focused their preliminary-injunction presentation on an alternative redistricting plan—practically to the exclusion of other evidentiary development—that plan fell away with Count II, and Appellants conceded that it "should not factor into" the Count I "consideration," Supp.App.48a; *see also* Supp.App.20a. The district court did not clearly err in concluding that the plan "does not preserve [the Commission's] communities of interest or even attempt to." J.S.App.248a. Nor did it abuse its discretion in denying Appellants an opportunity to prepare a new alternative when, "[f]or

good reasons," it "expedited at the [Appellants'] request briefing and argument." *Id.* The jurisdictional statement preserves no challenge to this procedural ruling.

3. That leaves the consistency element, *Karcher*, 462 U.S. at 741, which the district court decided in the Commission's favor based on a developed preliminary-injunction record, J.S.App.246a–48a. Specifically, the court found that the Commission's evidence "identified *every* one of [the] communities of interest," based on "hundreds of public comments that identify these *same* communities of interest" for "*each* district." J.S.App.249a–50a (emphases added). The court found that "the Plan is consistent throughout in its emphasis on communities of interest identified in comments submitted to the Commission." J.S.App.247–48a.

This Court reviews those findings of fact "under the deferential 'clear error' standard." *Glossip v. Gross*, 576 U.S. 863, 881 (2015). Appellants have no prospect of reversal when they presented no evidence of inconsistency. They challenged the Commission's evidence below as "a post-hoc justification," Dist.Ct.Dkt.53 at 6, but declined to take discovery to substantiate that assertion, J.S.App.225a. The district court correctly recognized that Commissioner Eid submitted his declaration "under penalty of perjury," J.S.App.243a, and Appellants neither responded in kind nor gave the district court any reason to disbelieve the sworn assertions of a state constitutional officer. And the district court compared the declaration against the legislative record and

found that "the overwhelming weight of the record now before us supports the Commission's judgment." J.S.App.250a. That evidence was "a 787-page appendix" with "copies of 546 comments" submitted by the Commission, as compared to "only 59" comments referenced by Appellants, "usually by way of '*see, e.g.*' cites." J.S.App.243a.

On appeal, Appellants rely predominantly on unsubstantiated rhetoric. They complain, for example, that "it did not matter" to the district court that the Commission's communities of interest were "applied inconsistently," J.S. 12, and that commissioners simply "c[a]me up with their own definition for the community-of-interest criterion" in an arbitrary way, J.S. 31. But they do not even attempt to say how these assertions square with the district court's careful analysis of the consistency element, its request for supplemental record development on that very question, and its ultimate finding that the criterion was consistently applied. Appellants also ask this Court to compare the Chestnut plan against their alternative, J.S. 11, but, in the district court, they "conceded that our original remedy map . . . should not factor into this Court's consideration," Supp.App.48a.

Next, the jurisdictional statement makes isolated criticisms of specific districts, J.S. 10–11, but fails to mention the district court's findings as to every individual district, *see* J.S.App.249a–50a. It criticizes the Commission's choice "to pair Muskegon and Grand Rapids in the same district," alleging that "the two communities have no meaningful interaction with

each other." J.S. 10. But this ignores more than 40 public comments of residents stating that "Grand Rapids and Muskegon have similar concerns," that there are "[l]ots of religious, cultural, and geographical similarities" between these cities, and the like. Dist.Ct.Dkt.61-2 at 55, 57; *see also id.* at 3–54 (reproducing similar comments). That is ample support for the district court's finding the Commission preserved "the economic I-96 corridor between Muskegon and Grand Rapids." J.S.App.249a.

There is likewise no factual basis for Appellants' assertion that "Congressional District 5, which encompasses Michigan's entire three-hundred-mile Southern Border, may be the hardest to justify." J.S. 10. At least 51 public comments established that "residents in counties that border Indiana and Ohio share 'unique circumstances' such as 'working, shopping, and praying across the border and dealing with interstate transportation." *Id.* (quoting J.S.App.142a–43a); *see* Dist.Ct.Dkt.61-4 at 4–63 (reproducing comments). Commenters asked the Commission to pay "attention [to] the all too often overlooked border county community," because "[c]ounties along the Ohio and Indiana borders share similarities that no other counties can relate to" and attested that "residents on both sides of the state commute across the state line twice a day for work"; "deal with tax disparities unique to the daily life of our border county residents"; "shop, dine, and enjoy outdoor areas in each state"; and "often share resources, state police posts, union regions, hospital systems[,] health departments[,] environmental concerns[,] infrastructure projects, broadcast media,

print media and much more." Dist.Ct.Dkt.61-4 at 33. It was not clearly erroneous for the district court to find that "the communities along the southern border of Michigan" share "unique cultural and economic interests of communities that border another state." J.S.App.249a.

Appellants then insist that "there is little rhyme or reason as to how the Chestnut Map accounts for religious and cultural communities." J.S. 10. The district court found otherwise. J.S.App.247–48a. Appellants cite just two examples against this finding: the splits of a Jewish community and a Middle Eastern community. J.S. 10–11. But the district court addressed these instances and correctly found that "keeping some communities intact inevitably means separating others"; that Appellants "cite only two comments urging the Commission to keep [the Jewish] community intact"; that the Commission did "largely" maintain the Middle Eastern community; and, "even in a comment-driven redistricting process, the Commission's decisions would unavoidably leave some commenters disappointed." J.S.App.246a–47a. Appellants cannot show clear error when they fail even to address these findings of fact, or any others.

B. Appellants' Request for a New Standard Is Unsupported in Law or the Record.

Having no basis to challenge the district court's findings under the governing standard, Appellants ask for a new standard. They propose that only interests meeting a series of new requirements, including that they be "readily ascertainable" with "admin-

istrative ease," may justify small population deviations. *E.g.*, J.S. 24, 27, 31–33. There is no merit in this line of argument.

1. As an initial matter, the Commission's communities-of-interest goals have been shown to meet any arguably applicable ascertainability standard. The district court found the Commission's goals *ascertainable* and in fact *ascertained* them. J.S.App.250a. Appellants' recourse was to present evidence on this question below and challenge the district court's findings on appeal through clear-error review, not to unilaterally pronounce that "determining whether the Commissioners applied this criterion in any consistent manner at all is an impossibility." J.S. 2.

If what Appellants mean by "readily ascertainable" through "administrative ease" is that courts should resolve this inquiry without evidentiary proceedings, *see* J.S. 24 (hinting at this view), that suggestion cannot withstand the one-person, one-vote decisions they cite, which were resolved on "evidence presented at trial." *Larios v. Cox*, 300 F. Supp. 2d 1320, 1322 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004); *see also Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 673–74, 676 (M.D. Pa. 2002), *appeal dismissed sub nom. Jubelirer v. Vieth*, 537 U.S. 801 (2002). *Tennant* and *Karcher* were also decided after bench trials. *See Karcher*, 462 U.S. at 729; *Tennant*, 567 U.S. at 761.

Appellants acknowledge the courts in those cases "could do [their] job," J.S. 27, and the court here did its job in the same way. The difference in outcomes

results from the difference in evidence. Whereas in *Vieth*, the two-judge majority found the state's justification was "a mere pretext," 195 F. Supp. 2d at 677, the court here found Commissioner Eid's attestations supported by "the overwhelming weight of the record now before us," J.S.App.250a. Whereas the *Larios* court "found that the deviations were systematically and intentionally created," among other things, "to allow rural southern Georgia and inner-city Atlanta to maintain their legislative influence," 300 F. Supp. 2d at 1338, Appellants do not allege that the Commission purposefully under-populated favored districts and over-populated disfavored districts. The district court found that the deviations resulted incidentally from a *bona fide* effort to implement "hundreds of public comments." J.S.App.250a. That is what it looks like for a federal court to "do its job." J.S. 27.

2. Appellants also assert that the Commission's broad discretion in redistricting is incompatible with justifying small populations deviations. *See, e.g.*, J.S. 31, 35. But this "Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978); *accord Upham v. Seamon*, 456 U.S. 37, 41–42 (1982). *Tennant* followed this unbreaking line of cases in holding that "redistricting 'ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment,'" 567 U.S. at 760 (quoting *Perry v. Perez*, 565 U.S. 388, 393 (2012) (per curiam)), and directing

lower courts "to defer to such state legislative policies," *id.* (citation omitted) (alteration accepted). By faulting the district court for having "failed to afford appropriate deference to West Virginia's reasonable exercise of its political judgment," *id.* at 759, *Tennant* confirmed that the equal-population rule neither denies legislative bodies the broad prerogative to set redistricting policy nor transfers that prerogative to federal courts. *Tennant* commanded unanimity ten years ago and needs no revisiting now.

Nor is there any currency in Appellants' effort to read into *Tennant* the very doctrines it rejected. J.S. 23. Appellants insist that *Tennant* approved only a narrow set of redistricting goals, such as "maintaining county lines." J.S. 23. But *Tennant* expressly stated that its "list of possible justifications for population variations [is] not exclusive." 567 U.S. at 764 (citing *Karcher*, 462 U.S. at 740). Appellants also say *Tennant* accepted only goals implemented through "objective and readily ascertainable data." J.S. 27. Yet *Tennant* explicitly endorsed redistricting goals that entail the "exercise of . . . political judgment." 567 U.S. at 760 (citation omitted). There is plenty of subjectivity in limiting "population shifts," which was among the goals *Tennant* approved, and this Court criticized the *Tennant* district court for disagreeing with how population was shifted, much as Appellants disagree with how the Commission defined communities of interest. 567 U.S. at 764. Appellants also propose that the Commission's burden was to justify "Each Deviation" from mathematical equality, J.S. 18 (boldface omitted), but *Tennant* disagreed, finding "no precedent for requiring legisla-

tive findings on the discrete, numerically precise portion of the variance attributable to each factor." 567 U.S. at 764 (internal quotation marks omitted). Appellants' contrary reading of *Tennant* quotes not one word of the opinion. *See* J.S. 23.

Nor does *Karcher* lend Appellants any support. *See e.g.*, J.S. 19–21. Like *Tennant*, *Karcher* confirmed that "[a]ny number of consistently applied legislative policies might justify some variance," that courts must be "willing to defer to state legislative policies," and that the "showing" is "flexible." 462 U.S. at 740–41. It is true that "*Tennant* stands hand-in-hand with *Karcher*," J.S. 22, but in a way that refutes, rather than supports, Appellants' novel theory. Appellants point to *Karcher*'s holding that no "*de minimis* level of population differences [are] acceptable." 462 U.S. at 731; J.S. 19–21, 33. But that language spoke to the first step of the analysis, where the challengers must show that "the population differences among districts could have been reduced or eliminated altogether." 462 U.S. at 730. The court below "assume[d]" Appellants made this showing "for purposes of argument" and conducted only the second step of the analysis. J.S.App.245a; *see supra* note 5. At that stage, *Karcher* commanded the very deference Appellants challenge. *See* 462 U.S. at 740–41.

The outcome in *Karcher* also does not support Appellants. *Karcher* rejected the New Jersey plan before it because the "one justification" offered—grouping "a large majority of black voters in Newark's Tenth District"—bore no connection to over-

populated districts on the other side of the state. *Id.* at 742–43. By contrast, the Commission here justified "each district." J.S.App.249a–50a; *see* J.S.App.139a–48a (district-by-district justification). That provides all the "specificity" and "consistency" *Karcher* requires. 462 U.S. at 741.

3. For similar reasons, Appellants have no legal foundation to argue that the communities-of-interest criterion can be valid and consistent only if implemented by the same "objective[]" definition across the State. J.S. 30–31. All districts, of course, cannot preserve the same communities, which are discrete and non-repeatable.

Nor would it make sense to demand that the Commission utilize only one cabined concept of community statewide. *See* J.S. 31–32. For one thing, defining the concept of community is the very "political judgment" *Tennant* approved. 567 U.S. at 760 (citation omitted). Accommodating legislative discretion—rather than diverting it to federal courts—is a central feature of its "flexible" standard. *Id.* (citation omitted). For another thing, the communities-of-interest criterion cannot be disentangled from public input, and individuals across the State do not identify their communities in a uniform way. By binding itself to a rigid definition, the Commission would frustrate the State Constitution's "principle of self-determinism," J.S.App.243a, forbidding itself from listening to the people who appear before it.

For yet another thing, Appellants' proposed approach turns out to be less objective than the Commission's approach, since it provides no direction in

which inflexible definition of community to use. If the thrust of comments from one region identifies communities by political-subdivision lines, but comments in other regions identify communities differently—such as by religious identity, geographic formations, or major roads—then Appellants would have the Commission impose the definition that predominates in one region over other regions. That would be less "objective" than the Commission's approach, since no standard—from outside the realm of political discretion—dictates which region of Michigan should impose its concept of community on other regions. *See* J.S.App.247a. The inquiry would almost certainly end in a federal court's imposition of its own political concept on the entire State, in contravention of this Court's repeated holdings that these choices are legislative, not judicial. It was far more objective for the Commission to define communities in each region according to the predominant thrust of comments in *that* region rather than by some definition devised from comments elsewhere.

4. Setting precedent aside, there is also no conceptual appeal in Appellants' position. They are incorrect to suggest that the requirement for courts to employ "judicially manageable standards" authorizes them to demand in turn that legislative bodies "achieve readily ascertainable goals," at least as Appellants seem to understand that phrase. J.S. 24 (discussing *Vieth v. Jubelirer*, 541 U.S. 267 (2004)). This Court's justiciability precedent distinguishes federal courts, which must "act in the manner traditional for English and American courts," from legislatures, which may promulgate laws that are "incon-

sistent, illogical, and ad hoc." *Vieth*, 541 U.S. at 278 (plurality opinion). The "powers granted to the [Commission] are legislative," Mich. Const. art. IV, § 6(22), and "involve[] lawmaking in its essential features and most important aspect," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 807 (2015) (citation omitted). It has no obligation to conduct itself like a judicial body.[6]

In cases alleging legislative impingement of fundamental rights, the question is not whether the legislative body utilized judicially manageable standards, but whether its justifications satisfy the governing level of scrutiny through an "assessment of

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[6] This case is not a vehicle for reconsidering this Court's holding in *Arizona State Legislature* that states may establish their own "prescriptions for lawmaking," including by creating redistricting commissions. 576 U.S. at 808. Appellants do not challenge the Commission's approved receipt of legislative power under the Constitution's Elections Clause. Nor does this case relate to the pending matter *Moore v. Harper*, No. 21-1271 (cert. granted Jun. 30, 2022), which will decide whether state courts may invalidate or promulgate state laws governing federal elections. Because the Michigan Constitution engrafts the Commission into the State's prescriptions for lawmaking, the Commission stands in the shoes of the North Carolina General Assembly in *Moore*, and no state court has intruded on its redistricting authority. *See* Brief for Petitioners at 24, *Moore v. Harper*, No. 21-1271 (filed Aug. 29, 2022). The Commission agrees with the position of the Arizona Independent Redistricting Commission that *Moore* is not a vehicle to reconsider *Arizona State Legislature*, which is settled precedent. *See* Brief of Ariz. Indep. Redistricting Comm'n as *Amicus Curiae* in Support of Neither Party at 3–4, *Moore v. Harper*, No. 21-1271 (filed Sep. 6, 2022).

ends and means." Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1272 (2007). That this inquiry may call on courts to "make the 'hard judgment' that our adversary system demands," *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008) (plurality opinion), does not somehow render that adversarial process hopelessly subjective. (And, if it did, that would be reason to reject a given cause of action as non-justiciable, not to invalidate legislation based on courts' political judgment. *See* J.S.App.232a–38a.)

The new legal test Appellants demand sounds curiously like strict scrutiny, which is the standard that "demand[s] an especially tight connection between challenged legislative means and the ends they are intended to promote." Fallon, *supra*, at 1274. But Appellants miss that this Court's precedents set the level of scrutiny in malapportionment cases by the "size of the deviations." *Karcher*, 462 U.S. at 741; *Tennant*, 567 U.S. at 760. A "small" deviation triggers a lenient standard, *Tennant*, 567 U.S. at 765, whereas larger deviations trigger more searching scrutiny and demand more compelling justifications, *see Kirkpatrick v. Preisler*, 394 U.S. 526, 532–33 (1969). That is why, in *Kirkpatrick*, this Court found Missouri's goal of "avoid[ing] fragmenting political subdivisions" not to be a "legally acceptable" justification for a deviation of near 26,000 residents (nearly 6%), *id.* at 528, 533–34, but *Tennant* held that the same interest justified a much smaller deviation, *see* 567 U.S. at 765. Because the deviation here is even smaller than that in *Tennant*,

Appellants' reliance on *Kirkpatrick* is unavailing. *See* J.S. 32.

In asking this Court to revise its one-person, one-vote case law to tighten the standard of scrutiny, Appellants ignore that this authority follows this Court's wider body of voting-rights precedent, which applies heightened scrutiny only to "severe" burdens on the right to vote and finds small burdens justified by policies that are "reasonable" and "nondiscriminatory." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citation omitted). A deviation of 0.14% is small, not severe. This Court has never adopted a reckless rule of *fiat justitia, ruat caelum*—let justice be done, though the heavens fall—at least not in this context. Appellants' demand that it do so now for the first time merits no further review.

CONCLUSION

The Court should summarily dismiss this appeal or affirm the district court's order denying a temporary injunction.

Respectfully Submitted,

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