No. 19-2377

IN THE
United States Court of Appeals
FOR THE SIXTH CIRCUIT

ANTHONY DAUNT, *et al.*, 1:19-cv-0064,
Plaintiffs-Appellants,

and

MICHIGAN REPUBLICAN PARTY, 1:19-cv-00669,
Plaintiff,

v.

JOCELYN BENSON, in her official Capacity
as Michigan Secretary of State, *et al.*,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
AT GRAND RAPIDS

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for Appellants certify that no party to this appeal is a subsidiary or affiliate of a publicly owned corporation and no publicly owned corporation that is not a party to this appeal has a financial interest in the outcome. Appellants are 15 individuals.

By: /s/ Jason Torchinsky
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STATEMENT REGARDING ORAL ARGUMENT

This matter involves the fundamental constitutional rights of free speech, association, and equal protection under the First and Fourteenth Amendments and is of the utmost importance. *See* Fed. R. App. P. 34(a). Further, considering the importance and complexity of these issues, Plaintiffs-Appellants believe that oral argument will assist the Court in its review. Accordingly, Plaintiffs-Appellants respectfully request oral argument.

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants brought this action pursuant to 42 U.S.C. § 1983 asserting violations of the First and Fourteenth Amendments of the U.S. Constitution.

This appeal involves the United States District Court for the Western District of Michigan's November 25, 2019, Opinion and Order Denying Plaintiffs-Appellants' Motion for Preliminary Injunction. (ECF 67) (PageID#926-971); (ECF 68) (PageID#972-973). Plaintiffs-Appellants sought this preliminary injunction to enjoin the Michigan Secretary of State from implementing the recently created "Michigan Citizens Redistricting Commission," including any preparations for the selection of commissioners. On December 5, 2019, Plaintiffs-Appellants filed their notice of interlocutory appeal from the District Court's order denying injunctive relief. (ECF 71) (PageID#980-981). Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Michigan's recently enacted Michigan Citizens Redistricting Commission prohibits certain citizens from serving as commissioners based on nothing more than their political activities and associations, or that of their relatives, all in violation of Plaintiffs-Appellants' First and Fourteenth Amendment rights. Furthermore, these unconstitutional provisions are not severable from the remaining portions of the law that created the Commission. The issue presented for review is whether the District Court erred when it denied Appellants' Motion for Preliminary Injunction.

STATEMENT OF THE CASE

This case concerns the prohibitions by which Michigan disqualifies individuals from serving on the Michigan Citizens Redistricting Commission, an entity that has been assigned the task of drawing Michigan's state and federal legislative districts for future elections. Specifically, the Commission's scheme excludes otherwise-qualified citizens from serving on the Commission simply because of their previous exercise of First Amendment rights, or their close relation to someone who has exercised such rights. (ECF 67) (PageID#936-939). Plaintiffs-Appellants are otherwise eligible to become Commission members but are excluded from eligibility. They assert that this disqualification injures their First and Fourteenth Amendment Rights under the U.S. Constitution.

Because the qualification provisions are not severable from the remainder of the Commission's enabling provisions, Plaintiffs-Appellants sought a preliminary injunction from the United States District Court for the Western District of Michigan to enjoin the Secretary of State from implementing the Commission and preparing for the selection of commissioners.

Factual Background

The Commission, established by a constitutional amendment passed by ballot proposal in November, 2018, *see* Mich. Const. art. IV, § 6(1)(B)-(C), (the "Amendment"), is tasked with redrawing Michigan's congressional and state legislative districts every 10 years following the decennial census. (ECF 67) (PageID#928-929). The Commission is meant to replace the existing legislative redistricting process and eliminate nearly all legislative oversight of that process. *Id*.

The Michigan Secretary of State is responsible for administering the application and selection process for members of the Commission. Mich. Const. art IV, § 6(2). The Secretary of State must make applications to serve on the Commission available from January 1, 2020, through June 1, 2020. *Id*. at § 6(2)(A), (C). This includes the mailing of applications to at least 10,000 randomly selected registered voters encouraging them to apply. *Id*. at § 6(2)(A). The Secretary of State will randomly select 200 finalists from the qualified applicants, including 60 who self-identify as Republican, 60 who self-identify as Democratic, and 80 who self-identify as unaffiliated with either major political party. *Id*. at § 6(2)(D)(II). The selection process must be statistically weighted so that the pool of 200 finalists mirrors the geographic and demographic makeup of Michigan as closely as possible. *Id*. The majority and minority leaders in the Michigan House

and Senate may reject up to five applicants each (20 total) before the final 13 commission members are randomly selected from among the finalists. *Id*. at § 6(2)(E). Commissioners must be selected by September 1, 2020. *Id*. at § 6(2)(F). Commissioners must be registered and eligible to vote in Michigan to be eligible to serve on the Commission. *Id*. at § 6(1)(A).

There are certain activities and associational relationships that disqualify a citizen from serving on the Commission. Each commissioner shall not currently be or, in the past six years, have been any of the following:

- A candidate or elected official of a partisan federal, state or local office;
- An officer or member of the leadership of a political party;
- A paid consultant or employee of an elected official, candidate, or political action committee;
- An employee of the legislature;
- Registered as a lobbyist or an employee of a registered lobbyist;
- A political appointee who is not subject to civil service classification;
- Any parent, stepparent, child, stepchild, or spouse of any individual that falls into one of the above categories.

Id. at § 6(1)(B), (C). For example, if a parent has a daughter in the employ of a registered lobbyist, that parent is barred from serving. Additionally, "[f]or five years after the date of appointment, a commissioner [would be] ineligible to hold a partisan elective office at the state, county, city, village, or township level in Michigan." *Id*. at § 6(1)(E).

The Commission application is now live on the Secretary of State's website.[1] This application asks a series of questions to " … make sure you're eligible and don't have any conflicts that would keep you from serving on the Citizens' Redistricting Commission." *Id*. The application explains that if the applicant answers "yes" to any one of the following statements, the applicant is "not eligible to serve on the Commission . . .":

(1) I am now, or have been at any time since August 15, 2014
   a. A declared candidate for a partisan federal, state, or local office.
   b. An elected official to partisan federal, state, or local office.
   c. An officer or member of the governing body of a national state or local political party.
   d. A paid consultant or employee of a federal, state, or local elected official or political candidate, of a federal, state, or local political candidate's campaign, or of a political action committee.
   e. An employee of the legislature.
   f. A lobbyist agent registered with the Michigan Bureau of Elections.
   g. An employee of a lobbyist registered with the Michigan Bureau of Elections.
   h. An unclassified state employee pursuant to Article XI, Section 5 of the Michigan Constitution.

(2) I am a parent, stepparent, child, stepchild, or spouse of a person to whom one or more of sections (a) through (h), above, would apply.
(3) I am disqualified for appointed or elected office in Michigan.

Id.

The application also asks applicants to state whether they identify with the Democratic Party, the Republican Party, or neither. *Id*. In addition, it provides the

[1] State of Michigan, Secretary of State, *Application for Citizens Redistricting*, https://redistrictingapplication.sos.state.mi.us.

applicant with the option of explaining his or her affiliation with the following question: " … [b]ecause Michigan voters do not register to vote by political party, if you would like to describe why – or how – you affiliate with either the Democratic Party, Republican Party, or neither, please do so below." *Id*.

The Secretary of State released on her website "Commissioner Eligibility Guidelines" that clarify the scope of the categories of individuals excluded from eligibility to serve on the Commission.[2] For example, the guidelines specify that a candidate for judge is eligible to serve on the Commission because judicial officers are non-partisan, *id*., even though some Michigan judges are nominated on a partisan basis. Volunteers of an elected official, political candidate, campaign, or political action committee are eligible to serve on the Commission because volunteers are not paid for their services. *Id*. In contrast, any individual serving as a paid consultant or employee of a non-partisan elected official, non-partisan political candidate, or non-partisan local political candidate's campaign since August 15, 2014, are not eligible to serve on the Commission because the language of the exclusion is not explicitly limited to partisan offices. *Id*.

Each commissioner holds office until the Commission has completed its obligations for the census cycle. Mich. Const. art 4, § 6(18). Commissioners

[2] The Office of Secretary of State Jocelyn Benson, *Commissioner Eligibility Guidelines*, https://www.michigan.gov/sos/0,4670,7-127-1633_91141-501739--,00.html.

receive compensation equal to at least 25% of the Governor's salary, and the State will reimburse commissioners for costs incurred if the legislature does not appropriate sufficient funds to cover these costs. *Id*. at § 6(5). As of 2019, the Governor of Michigan earns a salary of approximately $160,000 a year, meaning a commissioner will be compensated at least roughly $40,000. State of Michigan, Office of Secretary of State, *Frequently Asked Questions*, https://www.michigan.gov/sos/0,4670,7-127-1633_91141-488602--,00.html. *See also* Marissa Perino and Dominic-Madori Davis, *Here's the salary of every governor in all 50 US states*, Bus. Insider, https://www.businessinsider.com/governor-salary-by-state-2018-1#michigan-22.

The Amendment contains a severability clause that provides for severance of any provision found to conflict with the United States Constitution or federal law. Mich. Const. art. IV, § 6(20). However, that clause does not preclude a court from determining whether any unconstitutional provision cannot be severed.

Procedural History

On July 30, 2019, Plaintiffs-Appellants filed this Case against Secretary Benson, in her official capacity, alleging that the Commission's membership-exclusion scheme violates the First and Fourteenth Amendments. (ECF 67) (PageID#936). Plaintiffs-Appellants are individuals who are excluded from serving on the Commission because they fall into one or more of the ineligibility

categories. Compl. at 1-2 (ECF 1) (PageID#2-3); (ECF 67) (PageID#936-939). Plaintiffs-Appellants include individuals who are current or former declared candidates for local partisan office; incumbents in the Michigan Legislature; partisan precinct delegates; officers and members of the governing bodies of national, state, or local political parties; consultants and employees to candidates for a federal, state, or local office or a political action committee; an employee of the state legislature; a registered lobbyist; an unclassified state employee; and their family members. Compl. at 7-21 (ECF 1) (PageID#6-8); (ECF 67) (PageID#936-939). Thus, Plaintiffs-Appellants—who each desire to serve on the Commission—are excluded from consideration. *Id*.

Plaintiffs-Appellants sought a declaration that the exclusionary criteria set forth in Article IV, Section 6(1)(B) and (C) of Michigan's Constitution are unconstitutional and, further, that the entire Commission must be invalidated because the challenged provision is inseparable from the remainder of the provisions establishing and implementing the Commission. (ECF 1) (PageID#3). Plaintiffs also sought a preliminary injunction directing the Secretary of State to suspend her implementation of all provisions of the Michigan Constitution relating to the Commission. *Id*.; Mot. Prelim. Inj. (ECF 4) (PageID#53-90).

On August 22, 2019, the District Court allowed "Count MI Vote" d/b/a "Voters Not Politicians" (hereinafter VNP) to intervene as a Defendant in this

action. VNP filed the initiative petition that was eventually adopted as the Amendment.

On September 11, 2019, at Defendants' request, Plaintiffs-Appellants' case was consolidated with a second challenge to the Commission by members of a political party. Mot. to Consolidate (ECF 27) (PageID#314-318); Order Granting Mot. to Consolidate (ECF 30) (PageID#333-335). Accordingly, the District Court refers to Plaintiffs-Appellants as "Lead Plaintiffs" and their case as the "Lead Case". (ECF 67) (PageID#936). The District Court refers to the consolidated plaintiffs as "Member Plaintiffs" and their case as the "Member Case." *Id*. (PageID#939).

In its Opinion and Order dated November 25, 2019, the District Court denied Plaintiffs-Appellants' motion for preliminary injunction. (ECF 67) (PageID#926-971); (ECF 68) (PageID#972-973). Although the District Court correctly held that Plaintiffs-Appellants have standing and that their claims are not barred by laches, (ECF 68) (PageID#943-948), it denied Plaintiffs-Appellants' Motion for Preliminary Injunction. (ECF 68) (PageID#959).

The District Court said that Plaintiffs-Appellants had not shown that they are likely to succeed on the merits of either their First or Fourteenth Amendment claims, which essentially dictated the other preliminary injunction factors against Plaintiffs-Appellants. *Id*. (PageID# 950-959). In doing so, the District Court

applied the deferential *Anderson-Burdick* framework to Plaintiffs-Appellants claims. (ECF 67) (PageID#948-57).

Plaintiffs-Appellants now appeal from the denial of their motion for preliminary injunction. (ECF 67) (PageID#926-971); (ECF 68) (PageID#972-973).

Summary of the argument

The District Court erred as a matter of law in denying Plaintiffs-Appellants' Motion for Preliminary Injunction because it applied incorrect and overly deferential standards to Plaintiffs-Appellants' claims, holding that Plaintiffs were unlikely to succeed on the merits of their claim. These errors fatally infected the entire opinion because the District Court effectively determined that the Plaintiffs-Appellants' failure on the first preliminary injunction factor dictated the results of other factors in Defendants' favor. The District Court's Opinion and Order denying Plaintiffs-Appellants' Motion for Preliminary injunction should therefore be reversed and this Court should direct that the Motion be granted.

The District Court's principal error is its novel application of the *Anderson-Burdick* standard to this case. It is only through its application of *Anderson-Burdick* that the District Court could determine that Plaintiffs-Appellants were unlikely to succeed on the merits. The *Anderson-Burdick* standard is deferential to state *election administration*, but this case does not concern the administration or the mechanics of elections. Therefore, traditional constitutional standards should

have been applied. Those standards show that Plaintiffs-Appellants are likely to succeed on the merits and therefore their motion for preliminary injunction should be granted. The District Court's second error is its misapplication of Plaintiffs-Appellants' equal-protection arguments.

ARGUMENT

In denying Plaintiffs-Appellants' injunction request, the District Court erred as a matter of law. In determining whether to grant a preliminary injunction, a court must balance four factors: "(1) the likelihood that the movant will succeed on the merits; (2) whether the movant will suffer irreparable harm without the injunction; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether public interest will be advanced by issuing the injunction." *Jones v. Caruso*, 569 F.3d 258, 266 (6th Cir. 2009) (citing *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 399 (6th Cir. 1997); *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002)).

"As long as there is some likelihood of success on the merits, these factors are to be balanced, rather than tallied." *Hall v. Edgewood Partners Ins. Ctr., Inc.*, 878 F.3d 524, 527 (6th Cir. 2017) (citing *S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir. 2017)). But, "when a party seeks a preliminary injunction on the basis of a potential constitutional violation,

'the likelihood of success on the merits often will be the determinative factor.'" *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 689 (6th Cir. 2014), *cert. denied*, 135 S.Ct. 950 (2015) (quoting *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)). *See also Caruso*, 569 F.3d 258 at 266 (citing *Connection Distrib. Co. v. Reno*, 154 F.3d at 288 (6th Cir. 1998) (in the First Amendment context). "In short, 'because the questions of harm to the parties and the public interest cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation, the crucial inquiry often is . . . whether the [law] at issue is likely to be found constitutional." *Id*. *See also Tumblebus Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005). Moreover, the Third and Fourth factors merge when, as here, the government is a defendant. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

Although this Court generally reviews a decision to deny a Motion for Preliminary Injunction for abuse of discretion, *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 763 (6th Cir. 2019), this Court reviews "legal conclusions *de novo* and its factual findings for clear error." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 540-41 (6th Cir. 2007). So, although there is a generally deferential standard, a district court's decision to deny an injunction must be reversed if it "relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Id*. In this case,

the District Court's errors involve all three of these categories, though the latter two are the focus of this appeal.

I. The District Court erred in denying Plaintiffs-Appellants' Motion for Preliminary Injunction because Plaintiffs-Appellants are likely to succeed on the merits of their claims.

To satisfy the first prong of the preliminary injunction analysis, movants are not required to demonstrate that they *will* succeed on the merits at trial, nor are movants required to demonstrate that they will *probably* succeed on the merits of their claims. Plaintiffs-Appellants must only demonstrate that the legal issues they raise are substantial enough to constitute "fair ground[s] for litigation and thus [require] more deliberate investigation." *Roth v. Bank of Commonwealth*, 583 F.2d 527, 537 (6th Cir. 1978) (quoting *Hamilton Watch Co. v. Benrus*, 206 F.2d 738, 740 (2d Cir. 1953)). This Court must only "satisfy itself, not that the plaintiff certainly has a right, but that he has a fair question to raise as to the existence of such a right." *Brandeis Machinery & Supply Corp. and State Equipment Co., v. Barber-Geene Co.*, 503 F.2d 503, 505 (6th Cir. 1974) (citing *American Federation of Musicians v. Stein*, 213 F.2d 679, 683 (6th Cir. 1954), *cert. denied*, 348 U.S. 873 (1954)).

"It will ordinarily be enough [to warrant an injunction] that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for m[o]re deliberate

investigation." *Id*. (error in original) (citing *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2nd Cir. 1953)). When the correct legal standard is applied to the case, Plaintiffs-Appellants' constitutional claims meet the first preliminary injunction factor.

The District Court erred as a matter of law when it determined that Plaintiffs-Appellants had not shown a likelihood of success on the merits of their First or Fourteenth Amendment claims. (ECF 67) (PageID#948-57). The District Court's central error is that it clearly applied an erroneous legal standard—the generally deferential *Anderson-Burdick* test for election-related claims—rather than the traditional First and Fourteenth Amendment standards. Further, the District Court erred in holding that the State's interest in excluding Plaintiffs-Appellants from participation in the Commission is vital. Once the correct constitutional analyses are applied, Plaintiffs-Appellants are likely to succeed on the merits of their claims.

A. The District Court erred when it applied an erroneous *Anderson-Burdick* framework to this case, which does not concern election administration.

In its Opinion, the District Court applied the *Anderson-Burdick* framework to Plaintiffs-Appellants' claims to determine if they are likely to succeed on the merits. (ECF 67) (PageID#951-955). In doing so, the District Court adopted an incredibly novel argument set forth by Defendant Benson, namely that the

commission selection process is more akin to an election than to a hiring process. *Id*. (PageID#951-952). Not so. The *Anderson-Burdick* test has no place being applied outside the actual administration of conducting elections. The Supreme Court and this Court have already rejected the contrary argument. Since this case does not involve administration of any election, *Anderson-Burdick* does not apply.

The *Anderson-Burdick* test is a balancing test the Supreme Court articulated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and advanced in *Burdick v. Takushi*, 504 U.S. 428 (1992). Courts use this test as a "flexible standard" when a plaintiff alleges that a state has burdened voting rights in the administration of elections. *E.g*., *Obama for America v. Husted*, 697 F.3d 423, 428-29 (6th Cir. 2012); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 626-627 (6th Cir. 2016). The *Anderson-Burdick* test allows courts to weigh the character and magnitude of the asserted constitutional injuries against a state's interests in regulating elections. *Id*. Such a test makes perfect sense in adjudicating challenges to election regulations because "voting is of the most fundamental significance under our constitutional structure", *Burdick*, 504 U.S. at 433 (citation omitted), but "government must play an active role in structuring elections" to ensure fairness and honesty and avoid chaos during democratic processes. *Id*. Tension between these two interests arises because election laws "invariably impose some burden

upon individual voters." Therefore *Anderson-Burdick* provides a framework for courts to determine when election regulations cross the line.

The *Anderson-Burdick* framework applies to challenges to election laws relating to the *administration of elections*—and *only* to those election laws. *Burdick*, 504 U.S. at 433-34; *Moncier v. Haslam,* 570 Fed. Appx. 553, 559 (6th Cir. 2014); *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, (1997) ("States may, and inevitably must, enact reasonable regulations of *parties*, *elections*, and *ballots* to reduce election- and campaign-related disorder.") (emphasis added) (citing *Burdick*, 504 U.S. at 433); *Crawford v. Marion Cty. Election Bd*., 553 U.S. 181, 204 (2008) (Scalia, J., concurring).

There is no room in the *Anderson-Burdick* framework for considerations of non-election administration related regulations. Indeed, burdens on, or discrimination in, voting rights is the very trigger of the *Anderson-Burdick* test. *See Anderson*, 460 U.S. at 787-789; *Burdick*, 504 U.S. at 423-34; *Crawford*, 553 U.S. at 204 (Scalia, J., concurring) ("To evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in *Burdick* . . . .") (emphasis added), and the state's heightened interests in administering elections, *see* U.S. Const. art. 1, § 4,

Anderson, 460 U.S. at 787-789; *Burdick*, 504 U.S. at 423-34, *et seq*., are the interests those burdens are balanced against.

This Circuit has already held that *Anderson-Burdick* applies only to laws impacting the administration of candidate elections. In *Moncier v. Haslam*, an individual challenged a plan enacted by the Tennessee General Assembly which governed the selection, evaluation, and retention of judges who serve on the Supreme Court of Tennessee and the state's appellate courts. 570 Fed. Appx. 553, 553-555 (6th Cir. 2014). Under that plan, the Governor temporarily filled judicial vacancies by appointment, but those gubernatorial appointees had to run in a retention election to fulfill the remainder of the unexpired term they were serving. *Id*. The plaintiff in that case challenged the appointment/retention plan, alleging that it violated his and the people of Tennessee's First and Fourteenth Amendment rights to ballot access and political association. *Id*. That plaintiff relied heavily on *Anderson-Burdick* in pursing his First and Fourteenth Amendment claims. *Id*. at 558.

This Court held that *Anderson-Burdick* offered "no refuge" for the plaintiff because "*Anderson* and *Burdick* presupposed that state law required an election for a particular office in the first place." *Id*. at 559 (citing *Anderson*, 460 U.S. at 782; *Burdick*, 504 U.S. at 430). "Neither case mandated that states *organize their governments in a particular manner* . . . . Nor did either case stipulate when states

may deem a particular office vacant or *specify how states must fill those vacancies*." *Moncier* at 559. (emphases added). Accordingly, this Court held that *Anderson* and *Burdick* "bear little weight" on the case. *Id*.

The character of the laws challenged in *Moncier* is parallel to the Commissioner-selection scheme here. They both involve the selection of government employees by state officials without regulating elections of candidates. The character of the challenged law in *Moncier* is the very reason this Court declined to examine it under *Anderson-Burdick*. *Id*. The same holds true here.

The Supreme Court's decision in *McIntyre v. Ohio Elections Commission* is also instructive. 514 U.S. 334 (1995). The complainant in that case challenged under the First Amendment an Ohio law that prohibited the distribution of anonymous campaign literature. *Id*. at 337. The writing in question was a handbill urging voters to defeat a ballot issue. *Id*. Ohio principally relied on *Anderson-Burdick* to defend its prohibitions and the Ohio Supreme Court applied a similar reasoning in its decision below. *Id*. at 343-344. In reversing the Ohio Supreme Court, the Supreme Court flatly rejected this use of *Anderson-Burdick* outside of an election-law context:

> Unlike the statutory provisions challenged in *Storer* and *Anderson*, § 3599.09(A) of the Ohio Code *does not control the mechanics of the electoral process.* It is a regulation of pure speech. Moreover, even though this provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of speech. . . . Consequently, we are not faced with an ordinary election restriction;

> this case involves a limitation on political expression subject to exacting scrutiny.

Id. at 345-46. (emphasis added) (internal citations and quotation marks omitted).

So, too, here. The operation of the commissioner disqualification scheme does not involve the "voting process itself" or the "mechanics of the electoral process." *Id*. at 344-45. It involves First Amendment violations in the Commission's selection of its members. *See also Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 493, n. 5 (6th Cir. 1995) (Agreeing with the *McIntyre* decision that the *Anderson-Burdick* standard "is inappropriate to evaluate the constitutionality of a statute that burdens rights protected by the First Amendment."); *Tenn. State Conf. of N.A.A.C.P. v. Hargett*, No. 3:19-cv-00365, 2019 U.S. Dist. LEXIS 156812, *37-39 (M.D. Tenn. Sept. 13, 2019); *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 724-25, (M.D. Tenn. 2019).

Although the Supreme Court and this Court have applied *Anderson-Burdick* to a variety of laws, *see, e.g.*, *Crawford*, 553 U.S. 181 (upholding a voter ID law); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008) (upholding Washington's blanket primary law); *Calif. Democratic Party v. Jones*, 530 U.S. 567 (2000) (striking down California's blanket primary law); *Twin Cities Area New Party*, 520 U.S. 351 (upholding a ban on "fusion" candidates); *Burdick*, 504 U.S. at 434-38 (upholding a prohibition on write-in voting); *Anderson*, 460 U.S. at 788-90 (striking down an early filing deadline for

independent candidates); *Obama for America v. Husted*, 697 F.3d 423 (finding Ohio law preventing casting of early ballots by non-military voters violative of Equal Protection Clause); *Ohio Democratic Party v. Husted*, 834 F.3d 620 (upholding early voting law), they have *never* applied it to laws outside of the election administration context directly related to the voting process.

Tellingly, all the cases cited by the District Court and Defendant below supporting the use of the *Anderson-Burdick* standard directly involve the processes, procedures, and apparatuses of voting, rather than the type of underlying First Amendment burdens introduced by the Commission's exclusionary practices. Nevertheless, the District Court opined that *Anderson-Burdick* "provide[s] the better framework for examining the constitutionality of the criteria for membership on a state redistricting commission" due to "the interests at stake" in redistricting and redistricting commissions. (ECF 67) (PageID#951-952). But courts have never applied the *Anderson-Burdick* test in cases directly involving challenges to redistricting plans or redistricting commissions. *See, e.g.*, *Rucho v. Common Cause*, 139 S. Ct. 2484 (June 27, 2019) (challenge to North Carolina redistricting plan); *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015) (challenge to Arizona independent redistricting commission); *Vieth v. Jubelirer*, 541 U.S. 267, 271-317 (2004) (plurality op.) (challenge to Pennsylvania redistricting plan); *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d

867 (E.D. Mich. 2019) (three-judge panel*), vacating Chatfield v. League of Women Voters*, No. 19-220, 2019 U.S. LEXIS 6515 (Oct. 21, 2019). If the courts do not use the *Anderson-Burdick* test to examine direct challenges to redistricting plans or redistricting commissions directly, how then could they utilize it to examine challenges to selection schemes for redistricting commissioners? *Cf*. (ECF 67) (PageID#951-952). It should not be done and indeed, given the competing interests necessitating the *Anderson-Burdick* test, it cannot be done, regardless of the redistricting "interests at stake". (ECF 67) (PageID#951-952).

The District Court relied heavily on *Citizens for Legislative Choice v. Miller*, 144 F.3d 916 (6th Cir. 1998), which is inapposite. (ECF 67) (PageID#952, 954); (ECF 68) (PageID#550). There, a group of voters and public interest groups challenged a Michigan law that imposed lifetime term limits on state legislators. *Id*. at 918-919. Because the plaintiffs were voters and political groups—not the legislative candidates themselves—they were essentially arguing for a right to *vote* for a specific candidate or class of candidates. This Court held that no such right exists and *Anderson-Burdick* applies due to the *voting rights* implicated. *Id*. at 920-21. In contrast, this case involves free speech and association and how the government is using those characteristics to exclude candidates from a non-elected, government position. Because the law at issue in *Citizens for Legislative Choice* dealt with term limits for elected officials, it truly concerned elections and election

administration; not so here, as the Commission's exclusionary requirements involve no elections for the positions at issue. Accordingly, *Anderson-Burdick* is not an appropriate framework to apply here, nor is *Citizens for Legislative Choice*.

B. Traditional First Amendment standards govern the merits analysis in this Case.

Applying a traditional First Amendment analysis to this case shows that Plaintiffs-Appellees are likely to succeed on the merits of their claim. The Commission's exclusionary criteria are over- and under-inclusive rather than narrowly tailored to serve a vital government interest. Accordingly, the criteria are unconstitutional.

1. The Commission excludes categories of individuals based on their exercise of constitutionally protected speech and associations.

Plaintiffs-Appellants are individuals who fall into one or more of the eight categories set forth in Article IV, Section 6(1)(B) and (C) of Michigan's Constitution and therefore are excluded from Commission eligibility based on their exercise (or a family member's exercise) of one or more constitutionally protected interests. These interests include freedom of speech (*e.g.*, by the exclusion of candidates for partisan office or by the activities of certain relatives), right of association (*e.g.*, by the exclusion of members of political parties or by the activities of certain relatives), and/or the right to petition (*e.g.*, by the exclusion of registered lobbyists or by the activities of certain relatives). Each of these rights is

well established. For instance, the Supreme Court has made clear that lobbying is a quintessential example of the exercise of the right to petition that is protected by the First Amendment. "In a representative democracy . . . [the] government act[s] on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

The Supreme Court has also previously held that "[t]he First Amendment protects political association as well as political expression" (quoting *Buckley v. Valeo*, 424 U.S. 1, 15 (1976)) and that "[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom" of association. *Elrod*, 427 U.S. at 357 (plurality op.) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)).

> [P]olitical belief and association constitute the core of those activities protected by the First Amendment. Regardless of the nature of the inducement, whether it be by the denial of public employment or . . . by the influence of a teacher over students, [i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. And . . . . [t]here can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom. These protections reflect our profound national commitment to the principle that debate on public

> issues should be uninhibited, robust, and wide-open, a principle itself reflective of the fundamental understanding that [c]ompetition in ideas and governmental policies is at the core of our electoral process.

Elrod, 427 U.S. at 355-58 (internal citations omitted) (some alterations in original).

Moreover, the Supreme Court "has made clear that, even though a person has no 'right' to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act." *Rutan v. Republican Party*, 497 U.S. 62, 86 (1990) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). The government may not deny benefits to people in a way that infringes their constitutionally protected interests, especially freedom of speech. *Rutan* at 86. "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. 'This would allow the government to produce a result which [it] could not command directly.'" *Id*. (citing *Speiser*, 357 U.S. at 526) (alteration in original). Such interference with constitutional rights is impermissible. *Id*.

In applying these principles, the Supreme Court has recognized that government positions—such as a Commissioner position here—convey a valuable government benefit. The most obvious of these benefits are specific quantifiable economic benefits. In the present case, each commissioner receives a salary of

roughly $40,000 from the State, as noted above. And courts have recognized that quantifiable economic worth is not the only valuable benefit derived from a government position.

These principles were reiterated more recently by the D.C. Circuit in *Autor v. Pritzker*, 740 F.3d 176 (D.C. Cir. 2014), a case that is remarkably akin to the present case. Plaintiffs-Appellants cited *Autor* extensively below, yet that decision is conspicuously absent from the District Court's opinion. In *Autor*, federally registered lobbyists challenged the constitutionality of the President's decision to ban lobbyists from serving on federal-government advisory committees. *Id*. The D.C. Circuit, citing the *Sindermann* line of cases, reversed the district court's dismissal of the claim and held that the lobbyists pleaded a viable First Amendment unconstitutional-conditions claim by alleging that the government conditioned their eligibility for the valuable benefit of committee membership on their willingness to limit their First Amendment right to petition government. *Id*. at 184. By conditioning Plaintiffs-Appellants' eligibility on their willingness to forgo engaging in First Amendment-protected activity, the Commission does the exact same here. Indeed, even if Plaintiffs-Appellants stopped their own and their relatives' First Amendment activity tomorrow, it would be years before they would be eligible for Commission membership.

The "'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' *even if he has no entitlement to that benefit*." *Bd. of Cty. Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 674 (1996) (emphasis added) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). For instance, while there is no constitutional right to government employment, the government cannot condition employment on the relinquishment of constitutional rights. *See, e.g.*, *Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right.'") (alteration in original) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 n. 10 (1998)); *Connick v. Myers*, 461 U.S. 138, 142 (1983) ("[I]t has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967) and others); *Keyishian*, 385 U.S. at 606 ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon [government employment]." (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

Thus, Plaintiffs-Appellants—who each desire to serve on the Commission but are excluded from consideration—have been denied a benefit. It is through the

denial of this benefit that Plaintiffs-Appellants are being punished for no other reason than the exercise of their First Amendment rights, or that of a family member.

2. The Commission's exclusions are unconstitutional because they are both over- and under-inclusive and therefore not narrowly tailored.

The exclusion of Plaintiffs-Appellants from eligibility to serve on the Commission acts as an unconstitutional condition on employment because it is both over- and under-inclusive, rather than narrowly tailored to an adequate government interest.

Conditions of employment that compel or restrain belief and association (*e.g.*, patronage requirements or exclusionary factors based on a person's status within a political party), are inimical to the process which undergirds our system of government and is "at war with the deeper traditions of democracy embodied in the First Amendment." *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 576 (7th Cir. 1972). The Supreme Court has made clear that "[u]nder [its] sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so." *Rutan*, 497 U.S. at 78. "[T]he government must demonstrate (1) a vital government interest that would be furthered by its political hiring practices;

and (2) that the patronage practices are narrowly tailored to achieve that government interest."[3] *Vickery v. Jones*, 856 F. Supp. 1313, 1322 (S.D. Ill. 1994).

A law regulating speech is not narrowly tailored if it fails to advance the government's interests; the law is also not narrowly tailored if it is either over- or under-inclusive, and is not the least restrictive means among available, effective alternatives. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231-32 (2015); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121-23 (1991). A law regulating speech is over-inclusive if it implicates more speech than necessary to advance the government's interest(s). *Simon & Schuster*, 502 U.S. at 121-23. An under-inclusive law regulates less speech than necessary to advance the government's interest(s). *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

[3] Some courts have applied a strict-scrutiny standard in assessing the constitutionality of laws that burden the right to petition, requiring the government to demonstrate that the challenged law is justified by a "compelling government interest" and that it uses the "least restrictive means" of furthering that interest. *See, e.g.*, *ACLU v. New Jersey Election Law Enforcement Comm.*, 509 F. Supp. 1123, 1129 (D.N.J. 1981). This is a more demanding standard than intermediate scrutiny, which inquires whether the challenged law is "narrowly tailored to serve a significant governmental interest, and . . . leave[s] open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The narrow tailoring element of the intermediate scrutiny test requires that the government's chosen means not be "substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 800.

i. The Commission's criteria are both over- and under-inclusive.

Intervening Defendant VNP stated that the relevant government interest here was to create "a fair, impartial, and transparent process where voters - not politicians - will draw Michigan's state Senate, state House, and Congressional election district maps."[4] Regarding the exclusion of the eight categories of individuals from eligibility, VPN explained that "[t]he amendment disqualifies these individuals from serving on the Commission because they are *most likely* to have a conflict of interest when it comes to drawing Michigan's election district maps."[5]

The District Court below said these interests in excluding Plaintiffs-Appellants were "compelling". (ECF 67) (PageID#954). But in doing so, it relied, as it so often did in its Opinion, on *Citizens for Legislative Choice*. 144 F.3d at 923. And as explained above, *Citizens for Legislative Choice* is inapplicable and concerns entirely different interests and justifications.

In excluding certain categories of citizens from eligibility based on their exercise of core First Amendment rights, including freedom of speech, right of

[4] Voters Not Politicians, *We Ended Gerrymandering in Michigan*, https://votersnotpoliticians.com/redistricting.

[5] *Id*. (emphasis added)

association, and right to petition the government, the State has unconstitutionally conditioned eligibility for a valuable benefit on a willingness to limit those First Amendment rights. *See Adams v. Governor of Delaware*, 920 F.3d 878 (3d Cir. 2019) (Plaintiff's freedom of association rights were violated by a political balance requirement for Delaware's Supreme Court, Superior Court, and Chancery Court), *cert. granted sub nom., Carney v. Adams*, No. 19-309 (Dec. 6, 2019); *Autor*, 740 F.3d at 179.

The categories are purportedly based on the individual having engaged in activities that reach a certain level of partisanship. In short, the State draws an arbitrary line between certain levels of partisan activity—while some levels of partisan activity are deemed exclusionary (such as being a paid campaign consultant or serving as a precinct delegate), others are not (such as serving as a volunteer for a recognized party, or serving as a mayor in the City of Detroit elected on a "nonpartisan" basis).[6] Embedded in this arbitrary line drawing is the erroneous assumption that it is only elected officials, candidates, people who have been engaged in other political activities or lobbying, and those somehow tied to

[6] The system of self-identified "affiliation" (or lack of affiliation) is yet another aspect of the State's arbitrary system. Though individuals may self-identify their affiliation, the State has no mechanism to determine if an individual has accurately and truthfully designated his or her affiliation other than self-affirmation. There is no assurance that an applicant has appropriately declared his or her true political biases, undermining the stated goals of transparency and impartiality.

them (by family relationships), who have a "personal" or "private" interest in redistricting. These categories are both over- and under-inclusive, regardless of whether the exclusions are designed to eliminate partisanship or private interests. For example, it is impossible to say that the parent of a daughter who is employed by a lobbyist is too partisan to serve but that a volunteer in a political campaign or a "nonpartisan" (but clearly partisan) elected official are not. The exclusionary categories are not narrowly tailored to the government's interest. *Vickery*, 856 F. Supp. 1313 at 1322; *see also Lead Case*, ECF No. 4, Mot. Prelim. Inj., PageID#77.

The excluded-person categories here are both over- and under-inclusive. For instance, the restriction draws a distinction between registered and unregistered lobbyists, even though the latter lobbying activities may be far more extensive than the former. If the State believes that a lobbyist's financial interest is compellingly implicated by redistricting, there is no logical justification for distinguishing between registered and unregistered lobbyists. Someone in charge of grassroots lobbying for the League of Women Voters of Michigan would not be required to register as a lobbyist and would therefore not be excluded on that basis, while someone employed by Planned Parenthood as a lobbyist in Lansing would be required to register and would therefore be excluded.

Similarly, paid employees of elected officials, political candidates, campaigns, or political action committees are excluded from eligibility, while

volunteers are eligible to serve on the Commission.[7] Yet an unpaid volunteer may be *more* likely than a disqualified paid consultant to seek employment from a successful candidate.

Further, although Supreme Court Justices in Michigan are nominated by political parties in an inherently partisan process, current Justices (and those who have served on the Supreme Court in the last six years) are not excluded from eligibility to serve on the Commission, yet the State provides no explanation for the inconsistent treatment between these judges elected in connection with political party operations and other elected officials. Also, bafflingly inconsistent is that township candidates who serve in partisan positions are disqualified but "nonpartisan" city candidates are not.[8] So, a member of the Detroit City Council may serve, *even when supported and endorsed by the Democratic Party*, while a Republican trustee of Macomb Township may not serve.

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[7] *See* The Office of Secretary of State Jocelyn Benson, *Commissioner Eligibility Guidelines*, https://www.michigan.gov/sos/0,4670,7-127-1633_91141-501739--,00.html.

[8] This may have been an intentional design, given that in Michigan the large cities which are dominated by the Democratic Party tend to have "non-partisan" government systems, while smaller community government structures such as townships generally have partisan city councils and mayors, and tend to be controlled by Republican officials. Eric Walcott, *Why are some elections non-partisan*, Michigan State University Extension (Dec. 1, 2017) https://www.canr.msu.edu/news/why_are_some_elections_non_partisan.

Thus, the Plaintiffs have a strong likelihood of success on the merits because the government interest is not a sufficient fit with the restrictions to justify the distinction the challenged provision draws between Plaintiffs and all other eligible registered voters.

The Commission exclusions are not justified by the stated interests of implementing a "fair, impartial, and transparent redistricting process"[9] either, because excluding Plaintiffs from the Commission cannot be adequately linked to the achievement of those goals. While other aspects of the Commission can logically be connected to those goals (*e.g.*, prohibiting Commissioners from seeking election into the districts they draw, public meetings, publishing of each redistricting proposal, prohibition on *ex parte* communications with commissioners, prohibition on the acceptance of gifts by the commissioners, requirement of a majority vote for substantive determinations), excluding Plaintiffs from serving on the Commission because of their prior exercise of First Amendment rights cannot.

Perhaps the most startling example of over-inclusiveness is the exclusion of any parent, stepparent, child, stepchild, or spouse of any individual that falls into one of the other excluded categories. There is no basis to disqualify family

[9] Voters Not Politicians, *We Ended Gerrymandering in Michigan*, https://votersnotpoliticians.com/redistricting.

members, as they bear no relationship to the state's purported interest in eliminating individuals who have engaged in the state political process from redistricting decisions. Indeed, the Michigan Attorney General found unconstitutional a statute that prohibited political contributions by family members (including spouses, parents, children, or spouses of a child) of individuals with interest in a casino enterprise. Mich. Att'y Gen. Adv. Op. 7002 (1998). The Attorney General concluded that the family members "bear no relationship to th[e] state's compelling interest." *Id*.; *see also* SEC Rule 206(4)-5, 17 C.F.R. § 275.206(4)-5 (2010) (excluding spouses from "pay to play" rule prohibiting investment advisors making contributions to government officials that influence government entities to whom they provide services). However the State defines its interest, a familial relationship is insufficient to justify the denial of a citizen of his or her constitutional rights. And these are but a few examples of the scheme's constitutional shortcomings.

Below, Defendants argued that Plaintiffs-Appellants are excluded from serving on the Commission because they are the "most likely" to have a conflict of interest in the redistricting process, and the District Court appeared to adopt this argument. This assertion erroneously assumes that it is only elected officials and candidates, people who have been engaged in various political activities or lobbying, and those somehow tied to them, that have a personal and passionate

interest in the outcome of redistricting. Further, there are no mechanisms to identify and eliminate from consideration applicants who are extremely partisan in nature but do *not* fall into one of the banned categories. The Commission's application process provides a system of self-identified "affiliation" (or lack of affiliation) yet provides no definition of "affiliation" and no mechanism for the state to determine if an individual has accurately and truthfully designated his or her affiliation.

Michigan is one of many states that does not maintain voter registration based on political party. So, there is no assurance that an applicant has appropriately declared his or her true political biases, allowing for unchecked manipulation of the system and thus undermining the stated goals of transparency and impartiality. The result is a stark and inappropriate disparity in treatment between the Plaintiffs-Appellants and the vast numbers of citizens who are equally personally invested in the outcome of the redistricting process, but eligible to serve as a commissioner.

Most important, it is inappropriate to single out Plaintiffs based on perceived impartiality because the Commission itself is not designed to be impartial or non-partisan. Rather, it is designed to be an amalgam of a variety of views across the political spectrum. That Plaintiffs-Appellants' participation is somehow constitutionally justified because it will undermine the "impartiality" of a

Commission that necessarily includes a variety of views, including self-declared partisan ones, is unsupportable. There is no compelling explanation from the State or District Court as to how Plaintiffs-Appellants' exercise of their First Amendment rights would result in a Commission with less impartiality than a Commission that includes individuals who hold strong political views that are just as strong—or perhaps even stronger—but do not happen to fall into to one of the excluded categories of people.

Thus, the government has no legitimate basis to condition Plaintiffs-Appellants' eligibility to serve as Commissioner on their agreement to forgo constitutionally protected activities – and to have refrained from such activities for years prior to the ballot measure even being proposed – or to penalize them for having family members who exercised those same rights. This categorical exclusion of Plaintiffs-Appellants from serving on the Commission attaches an unconstitutional condition on eligibility because the State may not deny a benefit to a person on a basis that infringes his or her constitutionally protected rights.

ii. The Commission's criteria violate Equal Protection.

The Commission's exclusionary criteria also violate the Equal Protection Clause for many of the same reasons that they violate the First Amendment. The criteria burden only individuals that fall into set categories because of an exercise of their First Amendment rights (or their family members' exercise of such rights),

while imposing no restriction on individuals who may be just as partisan, or more partisan.

The District Court dedicated no more than a paragraph to its analysis of Plaintiffs-Appellants' Equal Protection claim. (ECF 67) (PageID#956-957). It held that because Plaintiffs-Appellants "do not belong to any suspect classification such as race or religion" the state need only meet rational basis, which it held it likely does in this case. *Id*. This was also error.

As the Supreme Court stated in *Police Dep't of Chicago v. Mosley*, and unlike Equal Protection cases involving protected and non-protected classes, "[t]he Equal Protection Clause requires that statutes *affecting First Amendment interests* be narrowly tailored to their legitimate objectives." 408 U.S. 92, 101 (1972) (emphasis added). The Commission's exclusionary criteria fails this standard. The exclusion scheme draws an unconstitutional distinction between those who exercise their rights of association and rights to petition the government and those who do not. The exclusions penalize some individuals who engage in lobbying but impose no sanction at all on other individuals whose "lobbying" activities are much more extensive than those subject to the policy, but who may structure their time so as not to cross registration thresholds.

Further, the Secretary of State has explained in her guidance that paid employees of an elected official, political candidate, campaign, or political action

committee are excluded from eligibility, but volunteers are eligible to serve on the Commission because they are not paid for their services.[10] Those same guidelines state that any individual serving as a paid consultant or employee of a non-partisan elected official, non-partisan political candidate, or nonpartisan local political candidate's campaign since August 15, 2014 may not be eligible to serve on the Commission. *Id*. Conversely, although Supreme Court Justices in Michigan are nominated by political parties in an inherently partisan process, they are not excluded from eligibility to serve on the Commission. *Id*. These are but a few examples of the irrational and constitutionally infirm exclusionary categories created by the Amendment.

Accordingly, the classifications on which the exclusionary commissioner selection criteria is based is not meaningfully tied to apparent State interests in promoting transparency, fairness, and impartiality in the redistricting process, and is certainly not narrowly tailored thereto.

By excluding certain categories of citizens from eligibility based on their exercise of core First Amendment rights—including freedom of speech, right of association, and right to petition the government—and failing to narrowly tailor the constitutional provisions to a compelling interest, the State has violated the First

[10] *See* The Office of Secretary of State Jocelyn Benson, *Commissioner Eligibility Guidelines*, https://www.michigan.gov/sos/0,4670,7-127-1633_91141-501739--,00.html.

and Fourteenth Amendments by unconstitutionally conditioning eligibility for a valuable benefit on Plaintiffs' willingness to limit their First Amendment rights. For these reasons, the Plaintiffs-Appellants have been and will continue to be unconstitutionally deprived of their First Amendment rights and the equal protection of the law.

3. The entire Commission should be declared invalid because the unconstitutional provisions are not severable from the rest of the Amendment.

When the correct legal standards are applied, Plaintiffs-Appellees are not only likely to succeed on the merits of their constitutional challenge to the specific exclusionary provisions of the Michigan constitution, but there is a strong likelihood that the entire Commission scheme will be declared invalid.[11]

The Amendment itself contains a severability clause:

> This section is self-executing. If a final court decision holds any part or parts of this section to be in conflict with the united states constitution or federal law, the section shall be implemented to the maximum extent that the united states constitution and federal law permit. Any provision held invalid is severable from the remaining portions of this section.

[11] Plaintiffs-Appellants argued against severability and therefore in favor of invalidating the entire Commission below, but because the District Court erroneously determined that Plaintiffs-Appellants were not likely to succeed on the merits of their constitutional claims, it declined to address the effect of the severability provision. (ECF 67) (PageID#957, n. 4).

Mich. Const. art. IV, § 6(20) (capitalization in original). Notwithstanding this clause, this Court must still determine whether the offending provisions of a law may be severed or if doing so would upset the will of the enactors. *In re request for Advisory Op. Regarding Constitutionality of 2011 PA 38*, 806 N.W.2d 683, 713-14 (Mich. 2011); *People v. McMurchy*, 228 N.W. 23, 727 (Mich. 1930); Mich. Att'y Gen. Op. No. 7309 (2019).

In examining severability, the Michigan Supreme Court has focused on whether severing a particular provision "is not inconsistent with the manifest intent of the legislature[.]"*Constitutionality of 2011 PA 38*, 806 N.W. 2d at 714 (quoting nearly identical severability language from Mich. Comp. Laws § 8.5) (citing *Eastwood Park Amusement Co. v. East Detroit Mayor*, 38 N.W. 2d 77, 81 (Mich. 1949)). Relevant factors in making this determination include indications that the legislature intended a different severability rule to apply, the remedy requested by the Attorney General, and evidence that the legislature would have adopted the statute even with the knowledge that provisions could be severed. *Constitutionality of 2011 PA 38*, 806 N.W. 2d at 713. This Court has explained that "the law remaining after an invalid portion of the law is severed will be enforced independently 'unless the invalid provisions are deemed so essential, and are so interwoven with others, that it cannot be presumed that the legislature intended the statute to operate otherwise than as a whole.'" *Garcia v. Wyeth-Ayerst Labs*, 385

F.3d 961, 967 (6th Cir. 2004) (quoting *Moore v. Fowinkle*, 512 F.2d 629, 632 (6th Cir. 1975)).

Applying these standards to a constitutional amendment approved by voters through a ballot proposal is challenging because there is little indication of intent, as there is in a legislative record. There is no comparable record of amendments or debate for a successful ballot initiative beyond the binary vote on election day. Accordingly, when in doubt, courts often presume that ballot provisions are not severable, leaving it to future voters to decide whether they want to keep a ballot measure that is missing invalidated provisions.

For example, in *In re Apportionment of State Legislature-1982*, 321 N.W.2d 565 (Mich. 1982), the Michigan Supreme Court was tasked with deciding whether Michigan's legislative redistricting commission could function under a set of standards different from those initially adopted at a state constitutional convention (since the first standards were deemed unconstitutional by the United States Supreme Court in *Marshall v. Hare*, 378 U.S. 561 (1964)). The court ruled the standards were not severable and that the whole regulatory regime had to be struck. Holding otherwise would have required the court to opine on whether the people would have voted for the commission without the standards subsequently found to be unconstitutional. Such a decision properly belonged to the people of Michigan and not to the court. *In re Apportionment of State Legislature-1982*, 321 N.W.2d at

138. No one "can . . . predict what the voters would do if presented with the severability question at a general election . . . . The people may prefer to have the matter returned to the political process or they may prefer plans drawn pursuant to the guidelines which are delineated in this opinion." *Id*. at 137.

Similarly, in *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713 (1964), Colorado voters approved an amendment to their state constitution that reapportioned state senate districts on a basis that the Supreme Court subsequently deemed unconstitutional. *Id*. at 717. The Court, ruling on the question of severability, struck down the entire amendment—including the constitutionally permissible population-based apportionment of the state house—because "there is no indication that the apportionment of the two houses of the Colorado General Assembly . . . is severable." *Id*. at 735.

Likewise, in *Randall v. Sorrell*, 548 U.S. 230, 262 (2006), the Supreme Court struck down an entire Vermont campaign finance statute after determining that the law's contribution limits violated the First Amendment. The majority determined that severing the unconstitutional provisions "would [have] require[d] us to write words into the statute . . . or to foresee which of many different possible ways the legislature might respond to the constitutional objections we have found." *Id*.

In making this severability inquiry, the fundamental question is intent. In *Minnesota. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), the Supreme Court assumed for the purpose of the decision that statutory severability standards applied to the constitutional analysis of executive orders. In ruling against severability, the Court affirmed that a severability inquiry "is essentially an inquiry into . . . intent," and proceeded to analyze the executive order by assessing the President's intentions in signing it. *Id*. at 191 (citing *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality op.).

Here, Ballot Proposal 2's wording specifically states that the proposed amendment would "[p]rohibit partisan officeholders and candidates, their employees, certain relatives, and lobbyists from serving as commissioners."[12] Further, the language of the accompanying draft amendments, which were provided to voters with the ballot proposal provided specific details of the exact categories of individuals that would be ineligible to serve on the Commission.[13] Consequently, the voters were aware of the specific categories of individuals that were deemed to be "too partisan" in nature, and thus excluded from eligibility in

[12] Michigan Board of State Canvassers, *Official Ballot Wording approved by the Board of State Canvassers August 30, 2018 Voters Not Politicians*, https://www.michigan.gov/documents/sos/Official_Ballot_Wording_Prop_18-2_632052_7.pdf.

[13] *Id*.

order to accomplish the stated objective of "prohibit[ing] partisan[s] . . . from serving as commissioners." Michigan Board of State Canvassers, *Official Ballot Wording approved by the Board of State Canvassers August 30, 2018 Voters Not Politicians*, https://www.michigan.gov/documents/sos/Official_Ballot_Wording_Prop_18-2_632052_7.pdf. In voting yes on the proposal, voters believed that such restrictions were a vital part of the overall proposal and thus not severable. To the extent the voters' intent is ambiguous, this Court should follow the lead of the Michigan and U.S. Supreme Courts and presume that the measure would not have passed but for the inclusion of the exclusionary criteria.

Further, the exclusionary factors play an essential role in accomplishing the goal that the Commission was designed to achieve—and in VNP's campaign to persuade voters to adopt Proposal 18-2—and therefore is so interwoven with the other provisions, it cannot be presumed that voters would have intended the Commission to exist without those provisions. *See Wyeth-Ayerst Labs*, 385 F.3d at 967. The State explained that the "people of Michigan" created the Commission to "combat the effects of 'excessive partisanship'" and "[t]he composition and selection of its members was designed to eliminate undue political influence in the drawing of district lines" and it "does so by rendering [individuals] ineligible to serve on the Commission." Lead Case, ECF No. 39, Def. Opp. Prelim. Inj.,

PageID#532-533. Thus, by Defendant's own admission, the exclusionary factors are essential to the Commission's intended functioning.

This intent was embodied in the ballot proposal's summary, which stated that the proposed amendment would "[p]rohibit partisan officeholders and candidates, their employees, certain relatives, and lobbyists from serving as commissioners". Michigan Board of State Canvassers, *Official Ballot Wording approved by the Board of State Canvassers August 30, 2018 Voters Not Politicians*, https://www.michigan.gov/documents/sos/Official_Ballot_Wording_Prop_18-2_632052_7.pdf. The language of the accompanying draft amendments provided specific details of the exact categories of individuals that would be ineligible to serve on the Commission. *Id*. The voters were aware of the specific categories of individuals that were excluded from eligibility in order to accomplish the stated objective of "prohibit[ing] partisan[s] . . . from serving as commissioners," and the courts should assume that these exclusions mattered to voters. *Id*.

In sum, there is a strong likelihood that Plaintiffs-Appellants will be successful not only in invalidating the Commission's selection criteria but also the Commission in its entirety because it is not possible to say that Michigan voters would have approved the ballot measure but for VNP's decision to include unconstitutional commissioner criteria.

C. Plaintiffs-Appellants are likely to succeed on the merits of their claims.

For the foregoing reasons, when the correct First and Fourteenth Amendment standards are applied to their claims, Plaintiffs-Appellants have a strong likelihood of success on the merits. Accordingly, the first and most important preliminary injunction factor weighs heavily in Plaintiffs-Appellants' favor.

II. The District Court erred in holding that Plaintiffs-Appellees' injuries are not irreparable absent an injunction.

The District Court also erred as a matter of law in holding that Plaintiffs-Appellees' constitutional harms are not irreparable absent an injunction. (ECF 67) (PageID#958). The harms analysis was driven entirely by the District Court's conclusion that Plaintiffs-Appellants were unlikely to prevail on the merits of their constitutional claims, and so Plaintiffs-Appellants would not suffer irreparable harm absent an injunction. *Id*. When the proper First Amendment framework is applied to Plaintiffs-Appellants' claims instead of *Anderson-Burdick*, it is clear that Plaintiffs-Appellants' First and Fourteenth Amendment rights are not only threatened but are currently being injured by their prohibition from eligibility to serve on the commission. That swings this factor in Plaintiffs-Appellants' direction.

It is well-settled that even minimal loss of First Amendment freedoms "unquestionably constitutes irreparable injury." *Connection Distrib. Co. v. Reno*,

154 F.3d 281, 288 (quoting *Elrod*, 427 U.S. at 373); *Elrod*, 427 U.S. at 373; *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989). *Accord, e.g.*, *Bonnell v. Lorenzo*, 241 F.3d 800, 809-10 (6th Cir. 2001); *Schicke v. Dilger*, No. 17-6456, 2017 U.S. App. Lexis 27024 *6-7 (6th Cir. Dec. 28, 2017). *See also N.Y. Times v. United States*, 403 U.S. 713, 715 (1971). Further, these rights need only be *threatened* to constitute irreparable harm. In *Elrod*, the Supreme Court affirmed the Court of Appeals decision to grant a preliminary injunction where individuals were merely threatened with dismissal based on their lack of patronage for the political party in power. The Court noted:

> [a]t the time a preliminary injunction was sought in the District Court, one of the respondents was only threatened with discharge. In addition, many of the members of the class respondents were seeking to have certified prior to the dismissal of their complaint were threatened with discharge or had agreed to provide support for the Democratic Party in order to avoid discharge. It is clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought.

427 U.S. at 373. Under those circumstances, the Court agreed with the Court of Appeals holding that "[i]nasmuch as this case involves First Amendment rights of association which must be carefully guarded against infringement by public office holders, we judge that injunctive relief is clearly appropriate in these cases." *Id.* (citing *Burns v. Elrod*, 509 F.2d 1133, 1136 (7th Cir. 1975)). The Court further stated that "[t]he loss of First Amendment freedoms, for even minimal periods of

time, unquestionably constitutes irreparable injury." *Id*. at 373-74 (citing *N.Y. Times*, 403 U.S. 713).

Here, Plaintiffs-Appellants are *already* being excluded from eligibility based on their exercise of constitutionally protected activity. Far from a minimal burden, Plaintiffs-Appellants are being banned from consideration and eligibility for participation in the Commission only because of their exercise of First Amendment rights. Without injunctive relief, Plaintiffs-Appellants' injury will continue.

Accordingly, Plaintiffs-Appellants will suffer irreparable injury absent an injunction and this factor balances heavily in Plaintiffs-Appellants' favor. The District Court, therefore, erred as a matter of law in holding to the contrary.

III. The District Court erred in holding that granting the injunction would substantially injure others and not further the public interest.

Regarding injury to others and the public interest, the District Court again deferred to its erroneous conclusion that Plaintiffs-Appellants were unlikely to prevail—"the public interest lies in a correct application of the federal constitutional and statutory provisions upon which the claimants have brought this claim . . ."—and stated its belief that the status quo lies with enforcement of the Commissioner selection protocol. (ECF 67) (PageID#959) (quoting *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006)); *Id*. Again, a proper merits analysis flips these factors.

In cases where harms are claimed on both sides, the Court should look to the merits. The primary factor showing irreparable harm to Plaintiffs-Appellants through the denial of their constitutional rights also shows why the public interest is furthered by an injunction. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (noting that the irreparable harm and public interest "merge" when the government is a party). "[T]he public interest lies in a correct application of the federal constitutional and statutory provisions upon which the claimants have brought this claim and ultimately. . . upon the will of the people of Michigan being effected in accordance with Michigan law." *Coalition to Defend Affirmative Action*, 473 F.3d at 252 (internal quotation and citation omitted).

In the present case, the public interest favors issuance of a preliminary injunction for reasons similar to those discussed with respect to the other preliminary injunction factors: "[E]nforcement of an unconstitutional law is always contrary to the public interest." *Pursuing Am.'s Greatness v. F.E.C.*, 831 F.3d 500, 511 (D.C. Cir. 2016) (quoting *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)). *See also League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action."). There is in fact a "substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations.'" *League of Women Voters*, 838 F.3d at 12 (citing *Washington v. Reno*,

35 F.3d 1093, 1103 (6th Cir. 1994)). This is because "it may be assumed that the Constitution is the ultimate expression of the public interest," *Gordon*, 721 F.3d at 653 (quotation marks omitted) (quoting *Llewlyn v. Oakland Cty. Prosecutor's Office*, 402 F. Supp. 379, 1393 (E.D. Mich. 1975)). The public interest is served by ensuring that the defendant does not irrevocably offend that document while this case is being litigated.

Further, a preliminary injunction will avoid possible disruption of the redistricting process and will avoid the diversion of limited state funds and other resources to a redistricting process that will eventually be declared constitutionally invalid. Though applications to serve on the Commission are not due until June, 2020, *see* Mich. Const. art 4 § 6(2)(F), the Secretary of State has already begun preparations for the Commission, including launching a web portal for individuals to learn more about the Commission and to apply to be Commissioners.[14] Soon, the Michigan Secretary of State will expend a significant amount of resources to mail applications to at least 10,000 randomly selected registered voters encouraging them to apply. Mich. Const. art 4, § 6(2)(A). The selection process will be completed no later than September 1, 2020. *Id*.; *Id*. at § 6(2)(A), (C). Thus, the

[14] The Office of Secretary of State Jocelyn Benson, *Commissioner Eligibility Guidelines*, https://www.michigan.gov/sos/0,4670,7-127-1633_91141---,00.html.

public interest lies in avoiding this potentially wasteful use of limited State resources.

Accordingly, the District Court erred as a matter of law in adjudicating each of the preliminary injunction factors and Plaintiffs-Appellants are entitled to a preliminary injunction.

IV. This Court should reverse and direct the District Court to grant Plaintiffs an injunction.

Plaintiffs-Appellants ask this Court to not only reverse the decision of the District Court, but also to remand with instructions to grant Plaintiffs-Appellants' Motion for Preliminary Injunction.

Generally, panels "entertaining a preliminary injunction appeal decide[] only whether the district court abused its discretion in ruling on the request for relief and do[] not go into the merits any further than necessary to determine whether the moving party established a likelihood of success." *Jones v. Caruso*, 569 F.3d 258, 269 (6th Cir. 2009) (quoting *Rogers v. Corbett*, 468 F.3d 188, 192 (3d Cir. 2006)). (citations omitted). "However, 28 U.S.C. § 1292(a)(1), which governs appeals of interlocutory orders granting or denying injunctions, provides courts of appeal with jurisdiction to reach the merits, at least where there are no relevant factual disputes and the matters to be decided are closely related to the interlocutory order being appealed." *Jones*, 569 F.3d at 269 (citations omitted). Indeed, there are many instances of appellate Courts doing just that. *See, e.g.*, *Thornburgh v. Am. Coll. of*

Obstetricians & Gynecologists, 476 U.S. 747, 757 (1986) (noting that appellate review on the merits of the issuance of an injunction is proper "if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance[.]"); *Jones*, 569 F.3d at 269-270 (on interlocutory appeal from a district court's denial of a preliminary injunction, this Court reviewed the merits of the motion because the record in that case contained the necessary facts); *Doe v. Sundquist*, 106 F.3d 702, 707-08 (6th Cir. 1997) (finding that reaching the merits was "in the interest of judicial economy," since "the legal issues have been briefed and the factual record does not need expansion" (citations omitted)); *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1256-57 (11th Cir. 2004) (on interlocutory appeal from the district court's denial of a preliminary injunction, the court determined that the appeal presented pure questions of law and struck down the county's permitting requirement for public demonstrations on First Amendment grounds); *ACLU v. Mukasey*, 534 F.3d 181, 187-88 (3d Cir. 2008) (noting that "[i]f a preliminary injunction appeal presents a question of law and the facts are established or of no controlling relevance, the panel may decide the merits of the claim") (quoting *Pitt News v. Pappert*, 379 F.3d 96, 104-05 (3d Cir. 2004)).

The record in this case contains the facts necessary to decide whether Plaintiffs-Appellants' claims warrant an injunction of the Commission; the

"pertinent facts are primarily drawn from the content of the constitutional language", (ECF 67) (PageID#928); and all "parties agree that the propriety of preliminary injunctive relief turns on questions of law, not any contested facts", *id*. In addition, because the Commission application process begins on January 1, 2020, time is of the essence. For all these reasons, this Court should review the merits of Plaintiffs-Appellants' Motion for Preliminary Injunction pursuant to 28 U.S.C. § 1292(a)(1).

CONCLUSION

No government may condition eligibility for employment on an applicant's willingness to give up constitutionally protected speech and associational activities. That prohibition applies double when the government excludes applicants based on the protected speech and associational activities of an applicant's family members. The Founders would be astonished at the brazen attempt to bar someone from a government position simply because they have a parent or child who happens to work for the wrong person. All of the Commission's eligibility exclusions are unconstitutional.

What's more, it is not at all clear that Michigan voters would have approved a ballot initiative without the unconstitutional exclusions. Notwithstanding the proposal's attempt to insulate itself from a severability analysis, the Court should hold that the eligibility requirements are not severable.

Accordingly, Plaintiffs-Appellants respectfully request that this Court reverse the decision of the District Court and direct the District Court to grant Plaintiffs-Appellants' Motion for Preliminary Injunction.

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By: /s/ Jason Torchinsky
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I hereby certify that on December 27, 2019, an electronic copy of the foregoing Opening Brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Sixth Circuit, using the appellate CM/ECF system. I further certify that all parties in this case are represented by lead counsel who are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

By: /s/ Jason Torchinsky
Attorney for Appellants

ADDENDUM

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY DAUNT, et al.,

Plaintiffs,

v.

JOCELYN BENSON, et al.,

Defendants.

Case No. 1:19-cv-614
(Lead)

MICHIGAN REPUBLICAN PARTY, et al.,

Plaintiffs,

v.

JOCELYN BENSON, et al.,

Defendants.

Case No. 1:19-cv-669
(Member)

HON. JANET T. NEFF

---/

OPINION

These consolidated cases involve federal constitutional claims brought under 42 U.S.C. § 1983 against Michigan Secretary of State Jocelyn Benson regarding the creation and administration of Michigan's Independent Citizens Redistricting Commission for State Legislative and Congressional Districts ("the Commission"). Plaintiffs in the Lead Case, which was filed in July 2019, are fifteen individuals who are allegedly excluded from serving on the Commission. Plaintiffs in the Member Case, which was filed in August 2019, are the Michigan Republican Party (MRP) and MRP's current chair, members, affiliates and/or relatives, who are also allegedly excluded from serving on the Commission. This Court permitted "Count MI Vote" d/b/a "Voters Not Politicians" (hereinafter VNP) to intervene as a Defendant in both actions. Plaintiffs in both

cases accompanied their Complaints with a motion for a preliminary injunction. Defendants oppose any injunctive relief and have filed motions to dismiss both cases. All of the motions were fully briefed last month, and the Court now turns to the requests for preliminary injunctive relief. Having considered the parties' submissions, the Court concludes that oral argument is not necessary to resolve the issues presented. *See* W.D. Mich. LCivR 7.2(d). For the reasons that follow, the Court denies the motions for a preliminary injunction in both cases.

I. BACKGROUND

A. Factual Background

The pertinent facts are primarily drawn from the content of the constitutional language, which is the factual background common to both cases. The parties agree that the propriety of preliminary injunctive relief turns on questions of law, not any contested facts.

Every ten years following the decennial United States Census, Michigan adjusts its state legislative and congressional district boundaries based on the population changes reflected in the census (Compl. ¶ 25, ECF No. 1 at PageID.8).[1] Until November 2018, the Michigan Legislature redrew the congressional and state legislative district boundaries (*id.*). Redistricting plans were adopted if approved by a simple majority vote in both chambers of the state legislature and subsequently signed by the Governor (*id.*). The state legislature last approved new congressional district boundaries on June 29, 2011, and the governor signed them into law on August 9, 2011 (*id.*). The 2011 redistricting plan was the subject of ongoing litigation (*id.* n.1).

On December 18, 2017, VNP filed an initiative petition with the Secretary of State that proposed amending the Michigan Constitution to establish a permanent Citizens Redistricting

[1] Consistent with the Court's consolidation order (ECF No. 30), docket references are to entries in the Lead Case, unless otherwise noted.

Commission in the legislative branch to redistrict Michigan's state legislative and congressional districts every ten years (Compl. ¶ 26, ECF No. 1 at PageID.10). The Commission would replace the existing legislative process and eliminate any legislative oversight of the redistricting process (*id.*).

As the Michigan Court of Appeals explained in its June 7, 2018 Opinion approving submission of VNP's proposal to the voters, VNP offered the proposed constitutional amendment "to remedy the widely-perceived abuses associated with partisan 'gerrymandering' of state legislative and congressional election districts by the establishment of new constitutionally mandated procedures designed to ensure that the redistricting process can no longer be dominated by one political party." *Citizens Protecting Michigan's Constitution v. Sec'y of State*, 922 N.W.2d 404, 410 (Mich. Ct. App. 2018), aff'd, 921 N.W.2d 247 (Mich. 2018).

On June 20, 2018, the Michigan Board of State Canvassers certified that the initiative petition had a sufficient number of valid signatures and added it as "Michigan Ballot Proposal 18-2" to the November 6, 2018 general election ballot (Compl. ¶ 27, ECF No. 1 at PageID.10). Ballot Proposal 18-2 provided the following:

Statewide Ballot Proposal 18-2

> A proposed constitutional amendment to establish a commission of citizens with exclusive authority to adopt district boundaries for the Michigan Senate, Michigan House of Representatives and U.S. Congress, every 10 years.
>
> *This proposed constitutional amendment would:*
>
> - Create a commission of 13 registered voters randomly selected by the Secretary of State:
>
> - 4 each who self-identify as affiliated with the 2 major political parties; and
>
> - 5 who self-identify as unaffiliated with major political parties.

- Prohibit partisan officeholders and candidates, their employees, certain relatives, and lobbyists from serving as commissioners.

- Establish new redistricting criteria including geographically compact and contiguous districts of equal population, reflecting Michigan's diverse population and communities of interest. Districts shall not provide disproportionate advantage to political parties or candidates.

- Require an appropriation of funds for commission operations and commissioner compensation.

Should this proposal be adopted?

[ ] YES
[ ] NO

Id. ¶ 28. Michigan voters passed the ballot proposal on November 6, 2018, and the Michigan Constitution was amended according to the revised language that accompanied the ballot proposal (*id.* ¶ 29). The amendment became effective on December 22, 2018. *See* MICH. CONST. 1963, Art. XII, § 2.

Articles IV through VI of the amended Michigan Constitution set forth specific details of the Commission including the application process, eligibility criteria, and process for seeking and selecting commissioners (Compl. ¶ 27, ECF No. 1 at PageID.10). Article IV pertains to the legislative branch, whereas Articles V and VI pertain to the executive and judicial branches. The eligibility criteria are found in Article IV, § 6 (1) of the Michigan Constitution, as amended, as follows:

> (1) An independent citizens redistricting commission for state legislative and congressional districts (hereinafter, the "commission") is hereby established as a permanent commission in the legislative branch. The commission shall consist of 13 commissioners. The commission shall adopt a redistricting plan for each of the following types of districts: state senate districts, state house of representative districts, and congressional districts. Each commissioner shall:
>
> (a) Be registered and eligible to vote in the state of Michigan;
>
> (b) Not currently be or in the past 6 years have been any of the following:

(i) A declared candidate for partisan federal, state, or local office;

(ii) An elected official to partisan federal, state, or local office;

(iii) An officer or member of the governing body of a national, state, or local political party;

(iv) A paid consultant or employee of a federal, state, or local elected official or political candidate, of a federal, state, or local political candidate's campaign, or of a political action committee;

(v) An employee of the legislature;

(vi) Any person who is registered as a lobbyist agent with the Michigan bureau of elections, or any employee of such person; or

(vii) An unclassified state employee who is exempt from classification in state civil service pursuant to article XI, section 5, except for employees of courts of record, employees of the state institutions of higher education, and persons in the armed forces of the state;

(c) Not be a parent, stepparent, child, stepchild, or spouse of any individual disqualified under part (1)(b) of this section; or

(d) Not be otherwise disqualified for appointed or elected office by this constitution.

(e) For five years after the date of appointment, a commissioner is ineligible to hold a partisan elective office at the state, county, city, village, or township level in Michigan.

MICH. CONST. Art. IV, § 6 (1).

As Secretary of State, Defendant Benson is the "chief election officer of the state" and is responsible for overseeing the conduct of elections. MICH. COMP. LAWS § 168.21. Subsection (2) of § 6 instructs Secretary Benson in the selection of commissioners, as follows:

(a) The secretary of state shall do all of the following:

(i) Make applications for commissioner available to the general public not later than January 1 of the year of the federal decennial census. The secretary of state shall circulate the applications in a manner that invites wide public participation from different regions of the state. The secretary of state shall also mail applications for commissioner to ten thousand Michigan registered voters, selected at random, by January 1 of the year of the federal decennial census.

(ii) Require applicants to provide a completed application.

(iii) Require applicants to attest under oath that they meet the qualifications set forth in this section; and either that they affiliate with one of the two political parties with the largest representation in the legislature (hereinafter, "major parties"), and if so, identify the party with which they affiliate, or that they do not affiliate with either of the major parties.

(b) Subject to part (2)(c) of this section, the secretary of state shall mail additional applications for commissioner to Michigan registered voters selected at random until 30 qualifying applicants that affiliate with one of the two major parties have submitted applications, 30 qualifying applicants that identify that they affiliate with the other of the two major parties have submitted applications, and 40 qualifying applicants that identify that they do not affiliate with either of the two major parties have submitted applications, each in response to the mailings.

(c) The secretary of state shall accept applications for commissioner until June 1 of the year of the federal decennial census.

(d) By July 1 of the year of the federal decennial census, from all of the applications submitted, the secretary of state shall:

(i) Eliminate incomplete applications and applications of applicants who do not meet the qualifications in parts (1)(a) through (1)(d) of this section based solely on the information contained in the applications;

(ii) Randomly select 60 applicants from each pool of affiliating applicants and 80 applicants from the pool of non-affiliating applicants. 50% of each pool shall be populated from the qualifying applicants to such pool who returned an application mailed pursuant to part 2(a) or 2(b) of this section, provided, that if fewer than 30 qualifying applicants affiliated with a major party or fewer than 40 qualifying non-affiliating applicants have applied to serve on the commission in response to the random mailing, the balance of the pool shall be populated from the balance of qualifying applicants to that pool. The random selection process used by the secretary of state to fill the selection pools shall use accepted statistical weighting methods to ensure that the pools, as closely as possible, mirror the geographic and demographic makeup of the state; and

(iii) Submit the randomly-selected applications to the majority leader and the minority leader of the senate, and the speaker of the house of representatives and the minority leader of the house of representatives.

(e) By August 1 of the year of the federal decennial census, the majority leader of the senate, the minority leader of the senate, the speaker of the house of representatives, and the minority leader of the house of representatives may each strike five applicants

from any pool or pools, up to a maximum of 20 total strikes by the four legislative leaders.

(f) By September 1 of the year of the federal decennial census, the secretary of state shall randomly draw the names of four commissioners from each of the two pools of remaining applicants affiliating with a major party, and five commissioners from the pool of remaining non-affiliating applicants.

MICH. CONST. Art. IV, § 6 (2).

In June 2019, the United States Supreme Court, in holding that partisan gerrymandering is non-justiciable, pointed to the establishment of independent redistricting commissions as a way that states are "restricting partisan considerations in districting through legislation," specifically referencing Michigan's 2018 adoption of Article 4, § 6. *Rucho v. Common Cause*, ___ U.S. ___, ___; 139 S. Ct. 2484, 2507 (2019).

In July 2019, Secretary Benson released draft text of the application to serve as a commissioner on its website and invited the public to comment until August 9, 2019 (Compl. ¶ 33, ECF No. 1 at PageID.13). The draft application asks a series of questions to ". . . make sure you're eligible and don't have any conflicts that would keep you from serving on the Citizens' Redistricting Commission" (*id.*, quoting App. A). The draft application explains that if the applicant answers "yes" to any one of the following statements, then the applicant is ". . . not eligible to serve on the commission . . . ":

(2) I am now, or have been at any time since August 15, 2014

a. A declared candidate for a partisan election office in federal, state, or local[;]

b. An elected official to partisan federal, state, or local office[;]

c. An officer or member of the governing body of a political party, at the local, state, or national level[;]

d. A paid consultant or employee of a federal, state, or local elected official or political candidate, campaign, or political action committee[;]

e. An employee of the legislature[;]

f. A lobbyist agent registered with the Michigan Bureau of Elections[;]

g. An employee of a lobbyist registered with the Michigan Bureau of Elections[;]

(3) I am a parent, stepparent, child, stepchild, or spouse of a person to whom sections (a) through (g), above, would apply[;]

(4) I am disqualified for appointed or elected office in Michigan[.]

Id. The draft application also asks applicants to state whether they identify with the Democratic Party, the Republican Party, or neither party (*id.*). It also provides the applicant with the option of explaining his or her affiliation with the following question, ". . . [b]ecause Michigan voters do not register to vote by political party, if you would like to describe why—or how—you affiliate with either the Democratic Party, Republican Party, or neither, please do so below" (*id.*).

The Secretary of State also released on its website, for public comment until August 9, 2019, draft Commissioner Eligibility Guidelines (Compl. ¶ 34, ECF No. 1 at PageID.14-15, citing App. B). The draft guidelines provide clarification on the scope of the categories of individuals excluded from eligibility to serve on the Commission (*id.* at PageID.15). For example, the draft guidelines specify that a candidate for judge may be eligible to serve on the Commission because judicial officers are non-partisan (*id.*). Further, the guidelines state that volunteers of an elected official, political candidate, campaign, or political action committee may be eligible to serve on the Commission because volunteers are not paid for their services (*id.*). In contrast, the eligibility guidelines state that any individual serving as a paid consultant or employee of a non-partisan elected official, non-partisan political candidate or nonpartisan local political candidate's campaign since August 15, 2014, may not be eligible to serve on the Commission because the language of the exclusion is not explicitly limited to partisan offices (*id.*).

Each commissioner holds office until the Commission has completed its obligations for the census cycle. MICH. CONST. Art. IV, § 6 (18). Commissioners receive compensation at least equal to 25 percent of the governor's salary, and the State will reimburse commissioners for costs incurred if the legislature does not appropriate sufficient funds to cover these costs. § 6 (5). "[M]embers of . . . commissions" do not hold "classified state civil service" positions. MICH. CONST. Art. XI, § 5.

The Secretary of State serves as Secretary of the Commission and, in that capacity, furnishes, under the direction of the Commission, "all technical services that the commission deems necessary." MICH. CONST. Art. IV, § 6 (4). The Secretary of State is a non-voting member of the Commission. *Id.*

The affirmative votes of at least seven members, including a minimum of two Democrats, two Republicans, and two members not affiliated with the major parties, are needed to pass a redistricting plan. MICH. CONST. Art. IV, § 6 (14)(C). Commissioners are required to prioritize specific criteria when developing redistricting plans, including compliance with federal laws; equal population sizes; geographic contiguousness; demographics and communities of similar historical, cultural, or economic interests; no advantages to political parties; no advantages to incumbents; municipal boundaries; and compactness. § 6 (13).

The new Article IV, § 6 (11) also includes an open-meeting requirement, which instructs that

> [t]he commission, its members, staff, attorneys, and consultants shall not discuss redistricting matters with members of the public outside of an open meeting of the commission, except that a commissioner may communicate about redistricting matters with members of the public to gain information relevant to the performance of his or her duties if such communication occurs (a) in writing or (b) at a previously publicly noticed forum or town hall open to the general public.

MICH. CONST. Art. IV, § 6 (11).

Last, the newly amended Article IV, § 6 includes a severability clause that prescribes severance of any provision found to be in conflict with the United States Constitution or federal law, and directs that the provisions of that section be implemented to the maximum extent allowable under the Constitution and federal law:

> (20) This section is self-executing. If a final court decision holds any part or parts of this section to be in conflict with the United States constitution or federal law, the section shall be implemented to the maximum extent that the United States constitution and federal law permit. Any provision held invalid is severable from the remaining portions of this section.

MICH. CONST. Art. IV, § 6 (20).

B. Procedural Posture

1. The Lead Case

On July 30, 2019, nearly nine months after the passage of Proposal 18-2, fifteen Plaintiffs filed this Lead Case against Secretary Benson, in her official capacity (Compl. ¶ 22, ECF No. 1 at PageID.8). The Lead Plaintiffs allege two counts: Violation of the First Amendment (Count I) and Violation of Equal Protection (Count II). Their claims concern the make-up of the Commission. Plaintiffs allege that they are individuals affiliated with the Republican Party who are "excluded from serving on the Commission because they fall into one or more of [the] eight categories" described above (*id.* ¶ 2). Specifically, Plaintiffs make the following allegations relevant to the eight categories:

"Declared candidate for partisan federal, state, or local office," MICH. CONST. Art. IV, § 6 (1)(b)(i). Plaintiff Aaron Beauchine became a declared Republican candidate for Ingham County Commissioner, a local partisan office, on March 15, 2018 (Compl. ¶ 9, ECF 1 at PageID.5).

"Elected official to partisan federal, state, or local office," MICH. CONST. Art. IV, § 6 (1)(b)(ii). Plaintiff Tom Barrett became a declared candidate for partisan state office on September 13, 2017 and was elected as a Republican to the Michigan Senate in November 2018 (Compl. ¶ 8,

ECF 1 at PageID.5). His term of office began January 1, 2019 (*id.*). Several Plaintiffs— Linda Tarver, Mary Shinkle, Norm Shinkle and Clint Tarver—also serve as elected Republican precinct delegates (*id.* ¶¶ 14, 17, 18 & 21).

"***Officer or member of the governing body of a national, state, or local political party,***" MICH. CONST. Art. IV, § 6 (1)(b)(iii). Plaintiff Anthony Daunt has served as an officer and member of the governing body of the Clinton County Republican Party since 2017 (Compl. ¶ 7, ECF 1 at PageID.5). Since April 2017, Plaintiff Anthony Daunt has also served as a member of the governing body of the Michigan Republican Party Committee (*id.*). Plaintiff Kathy Berden has served as the national committeewoman of the Republican Party since 2016 (*id.* ¶ 10). Plaintiff Gerry Hildenbrand has been a member of a governing body of a national, state, or local political party since 2017 (*id.* ¶ 12). Plaintiff Linda Tarver serves as President of the Republican Women's Federation of Michigan, which is a voting member of the Michigan Republican Party's State Central Committee (*id.* ¶ 14). Plaintiff Marian Sheridan has been a member of a governing body of a state political party since February 2019, specifically the Grassroots Vice Chair of the Michigan Republican Party (*id.* ¶¶ 16 & 19). Plaintiff Mary Shinkle has served as the Vice Chair of the Ingham County Republican Party, a local political party, since November 2018 (*id.* ¶ 17). And Plaintiff Norm Shinkle has been an officer or member of a governing body of a state political party since February 2017 (*id.* ¶ 18).

"A paid consultant or employee of a federal, state, or local elected official or political candidate, of a federal state, or local political candidate's campaign, or of a political action committee," MICH. CONST. Art. IV, § 6 (1)(b)(iv). Plaintiff Gary Koutsoubos has been a consultant to a candidate(s) for a federal, state, or local office or a political action committee since July 8, 2017 (Compl. ¶ 13, ECF 1 at PageID.6). Plaintiff Patrick Meyers has been a paid consultant to

candidate(s) for federal, state, or local office or a political action committee since 2010 (*id.* ¶ 15). Plaintiff Mary Shinkle was an employee of Republican Congressman Mike Bishop, a federal elected official, between 2015 and 2018 (*id.* ¶ 17).

"*Employee of the Legislature*," MICH. CONST. Art. IV, § 6 (1)(b)(v). Plaintiff Stephen Daunt has been an employee of the Michigan Legislature since January 1, 1991 (Compl. ¶ 11, ECF 1 at PageID.6).

"Any person who is registered as a lobbyist agent with the Michigan bureau of elections…," MICH. CONST. Art. IV, § 6 (1)(b)(iv). Plaintiff Anthony Daunt has served as a registered lobbyist agent in the State of Michigan since August 2013 (Compl. ¶ 7, ECF 1 at PageID.5).

"An unclassified state employee who is exempt from classification…," MICH. CONST. Art. IV, § 6 (1)(b)(vii). Plaintiff Koutsoubos was an unclassified state employee between March 2014 and June 2017 (Compl. ¶ 13, ECF 1 at PageID.6).

"[A] parent, stepparent, child, stepchild, or spouse of any individual disqualified under part (1)(b)," MICH. CONST. Art. IV, § 6 (1)(c). Plaintiffs Norm and Mary Shinkle are husband and wife (Compl. ¶ 17-18, ECF 1 at PageID.7). Plaintiffs Clint Tarver and Linda Lee Tarver are husband and wife (*id.* ¶ 21). Plaintiff Paul Sheridan is the son of Plaintiff Marian Sheridan (*id.* ¶ 19). And Plaintiff Bridget Beard is the daughter of Plaintiff Marian Sheridan (*id.* ¶ 20).

The Lead Plaintiffs indicate that they "each desire to serve on the Commission but are excluded from consideration" (Compl. ¶ 39, ECF 1 at PageID.17). The Lead Plaintiffs seek to have this Court (1) declare the Commission "unconstitutional and invalid and the administration of the selection of commissioners a violation of Plaintiffs' constitutional rights," and (2) enjoin Defendant Benson and her employees and agents from administering or preparing for the selection

of commissioners to serve on the Commission (*id.* at PageID.31). Plaintiffs accompanied their Complaint with a Motion for a Preliminary Injunction (ECF No. 4), specifically seeking to have this Court "direct the Secretary of State to suspend her implementation of all provisions of the Michigan Constitution relating to the Commission including any preparations for the selection of commissioners" (*id.* at PageID.90). The Lead Plaintiffs have also since filed a Motion for a Status Conference (ECF No. 64), pointing out that Secretary Benson has "already taken several crucial steps towards implementation" of the Commission (*id.* at PageID.915).

2. The Member Case

On August 22, 2019, the MRP and five individual Plaintiffs filed the Member Case, alleging the following five claims:

I. Violation of Freedom of Association [MRP]
II. Violation of Freedom of Association [Individual Plaintiffs]
III. Violation of Freedom of Speech—Viewpoint Discrimination
IV. Violation of Freedom of Speech—Restricted Speech
V. Violation of Equal Protection

Like the Lead Plaintiffs, the Member Plaintiffs also challenge the eligibility criteria of amended Article 4. It is not in dispute that the MRP is a "major political party" as that term is defined in Michigan's Election Law, MICH. COMP. LAWS § 168.16, and used in the challenged provisions. Plaintiffs make the following allegations relevant to four of the enumerated categories:

***"Declared candidate for partisan federal, state, or local office*,"** MICH. CONST. Art. IV, § 6 (1)(b)(i). Plaintiff Laura Cox has, within the past six years, been a declared candidate for the partisan offices of state representative and state senator (Member Compl. ¶ 21, ECF No. 1 at PageID.5). Within the past six years, Plaintiff Terri Lynn Land was a declared candidate for United States Senator and precinct delegate, both partisan offices (*id.* ¶ 22). Within the past six years, Plaintiff Dorian Thompson was also a candidate for the partisan office of precinct delegate

(*id.* ¶ 24). Plaintiff Hank Vaupel was a declared candidate for state representative within the past six years (*id.* ¶ 25).

"Elected official to partisan federal, state, or local office," MICH. CONST. Art. IV, § 6 (1)(b)(ii). Plaintiff Cox served as a Wayne County Commissioner from 2005 through 2014, and as a state representative from 2015 through 2018 (Member Compl. ¶ 21, ECF No. 1 at PageID.5). Plaintiffs Land and Thompson served as elected precinct delegates (*id.* ¶¶ 22 & 24). Plaintiff Vaupel is currently an elected state representative (*id.* ¶ 25).

"Officer or member of the governing body of a national, state, or local political party," MICH. CONST. Art. IV, § 6 (1)(b)(iii). Plaintiff Cox is currently the chair of the MRP (Member Compl. ¶ 21, ECF No. 1 at PageID.5). Plaintiff Land is currently the chair of the 3rd Congressional District for MRP and in that capacity serves as a member of the MRP State Committee (*id.* ¶ 22). Land also served as the "National Committeewoman" of the MRP from 2012 through 2014 (*id.*). Plaintiff Vaupel is currently a member of the Livingston County Republican Party Executive Committee (*id.* ¶ 25).

"[A] parent, stepparent, child, stepchild, or spouse of any individual disqualified under part (1)(b)," MICH. CONST. Art. IV, § 6 (1)(c). Plaintiff Savina Alexandra Zoe Mucci is the daughter of Tonya Schuitmaker, who is a former state senator and was the declared candidate for the office of attorney general in the 2018 election (Member Compl. ¶ 23, ECF No. 1 at PageID.6).

The Member Plaintiffs allege that they each "wish to apply to serve on the [C]ommission when applications are made available but are ineligible to hold such public office under the terms of the VNP Proposal" (Member Compl. ¶ 61, ECF No. 1 at PageID.15).[2] The Member Plaintiffs

[2] Although Michigan voters approved the "VNP proposal" more than one year ago and the amendments have been in effect since December 22, 2018, Plaintiffs' Complaint (and their motion

seek to have this Court (1) "declar[e] the VNP Proposal unconstitutional under the First and Fourteenth Amendments to the United States Constitution," and (2) "enjoin[] Defendant from implementing, administering, or otherwise enforcing the VNP Proposal" (*id.* at PageID.24). The Member Plaintiffs accompanied their Complaint with a Motion for a Preliminary Injunction (Member Case, ECF No. 2), requesting "an Order enjoining Defendant Secretary of State, and her employees and agents, from implementing all provisions of the VNP Proposal" (Member Case, ECF No. 3 at PageID.75). The Member Plaintiffs have also joined in the Lead Plaintiffs' request for a Status Conference (ECF No. 66).

II. ANALYSIS

A. Motion Standard

"Preliminary injunctions are 'extraordinary and drastic remed[ies] ... never awarded as of right.'" *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Supreme Court*, 769 F.3d 447, 453 (6th Cir. 2014) (quoting *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (examining a preliminary injunction that preserved the state-law status quo)). "[T]hat is why the plaintiff bears the burden to justify relief, even in First Amendment cases." *Id.* (citing *McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012) (citing *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974)). Further, a plaintiff "bears the burden of showing that he has standing for each type of relief sought." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing the [standing] elements.").

Federal Rule of Civil Procedure 65, which governs the issuance of preliminary injunctions,

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briefing) nonetheless repeatedly uses the phrase "VNP Proposal." The Court has simply interpreted Plaintiffs' references to the "proposal" to mean the enacted provisions.

does not explicitly require the court to conduct an evidentiary hearing before issuing an injunction. FED. R. CIV. P. 65(a)(1). The Sixth Circuit Court of Appeals has held that an evidentiary hearing is only required when there is a disputed factual issue and the documentary evidence upon which to base an informed, albeit preliminary, conclusion is inadequate. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 552-53 (6th Cir. 2007); *S.E.C. v. G. Weeks Sec., Inc.*, 678 F.2d 649, 651 (6th Cir. 1982). Here, as noted, there are no contested facts, and there is an adequate basis for reaching informed, albeit preliminary, conclusions in these cases.

In evaluating a request for a preliminary injunction, a district court should consider: (1) the movant's likelihood of success on the merits; (2) whether the movant will suffer irreparable injury without a preliminary injunction; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Platt, supra*; *McNeilly, supra.* "[T]he district court balances four factors—not one—even in First Amendment cases." *Platt, supra* (citing, e.g., *Doran v Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (separately balancing "irreparable injury" in a First Amendment case)).

That said, the factors of irreparable harm and consideration of the public interest largely depend on whether a constitutional violation exists. *Libertarian Party of Ohio v. Hulsted*, 751 F.3d 403, 412 (6th Cir. 2014); *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 689-90 (6th Cir. 2014). Therefore, the Court will focus its analysis on Plaintiffs' likelihood of success on the merits of each of their respective claims. The Court will then briefly discuss the remaining factors to determine whether, on balance, the factors weigh in favor of granting or denying preliminary injunctive relief. *See also O'Toole v. O'Connor*, 802 F.3d 783, 792 (6th Cir. 2015) (observing that while "the 'likelihood of success' prong is the most important," it is "only one of the factors to be

considered by a court"). The final two stay factors, the harm to others and the public interest, "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009); *Gun Owners of Am., Inc. v. Barr*, No. 19-1298, 2019 WL 1395502, at *1 (6th Cir. Mar. 25, 2019); *Slyusar v. Holder*, 740 F.3d 1068, 1074 (6th Cir. 2014).

Last, the Court observes that "[w]hile the grant of a stay is governed by legal standards, it is ultimately subject to a court's discretion." *Slyusar*, 740 F.3d at 1074 (citing *Nken, supra*). *See also Louisiana-Pac. Corp. v. James Hardie Bldg. Prod., Inc.*, 928 F.3d 514, 517 (6th Cir. 2019) (instructing that a court should "balance rather than tally these factors").

B. Threshold Questions

1. Standing

VNP contends that this Court should conclude, at the outset, that the Lead Plaintiffs lack standing to assert their claims for the relief requested (ECF No. 32 at PageID.356). Specifically, VNP first argues that the Lead Plaintiffs cannot establish standing in this matter where there is no basis for the Court to conclude that it would be "likely," as opposed to purely "speculative," that an inability to serve on the Commission would be remedied by a favorable decision in this matter (*id.* at PageID.356-357). According to VNP, Plaintiffs would have the "same minimal chance of being randomly selected that any other applicant would have" (*id.*). Second, VNP argues that the prayer for relief made in the Lead Plaintiffs' Complaint and their present Motion for Preliminary Injunction shows that they are not seeking a remedy that would allow them an opportunity to serve on the new Commission at all (*id.* at PageID.357). VNP argues that Plaintiffs are "instead asserting, and seeking a remedy for, a generalized grievance shared by everyone who voted 'no' on Proposal 18-2" (*id.*). VNP makes the same argument with regard to the individual Plaintiffs in the Member Case (ECF No. 36 at PageID.445-454).

In response, the Lead Plaintiffs argue that they easily demonstrate injury in fact where they are currently banned from Commission eligibility because of their prior exercise of First Amendment rights (ECF No. 57 at PageID.818-819). Plaintiffs assert that "forcing" them to choose between eligibility and continuing to exercise their First Amendment rights is, on its own, an adequate basis for standing (*id.* at PageID.819-820). Plaintiffs opine that their injuries would clearly be redressed by a decision providing the requested injunctive relief or by "the invalidation of the Commission in its entirety" (*id.* at PageID.820-821). Plaintiffs in the Member Case similarly respond that they have adequately shown both injury in fact and redressability (ECF No. 54 at PageID.770-778).

VNP's argument lacks merit.

Article III, § 2 of the United States Constitution provides that the judicial power of the federal courts "extends only to 'Cases' and 'Controversies.'" *Spokeo, Inc. v. Robins*, ___ U.S. ___; 136 S. Ct. 1540, 1547 (2016) (quoting U.S. CONST. Art. III, § 2). Standing "ensure[s] that federal courts do not exceed their authority" and "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Id.* The doctrine of standing, which is one of several doctrines that reflect this fundamental limitation, requires federal courts to satisfy themselves that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." *Summers*, 555 U.S. at 493 (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)).

The "irreducible constitutional minimum of standing" requires the plaintiff to show "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed

by a favorable decision." *State by & through Tennessee Gen. Assembly v. United States Dep't of State*, 931 F.3d 499, 507 (6th Cir. 2019) (quoting *Lujan*, 504 U.S. at 560). *See also Hearring v. Sliwowski*, 806 F.3d 864, 868 (6th Cir. 2015) ("To establish standing for a forward-looking injunction, a party must show a 'threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical.'") (quoting *Summers*, 555 U.S. at 493).

Here, VNP's first argument relies on identifying Plaintiffs' injury as the ultimate denial of membership on the Commission, which VNP argues is an abstract and speculative injury. In contrast, Plaintiffs have claimed that their *ineligibility* is their injury, an injury in fact that is both particularized to them and concrete. For purposes of this standing inquiry, the Court presumes the truth of Plaintiffs' allegations about their ineligibility under the eight delineated categories. *See, e.g., Meese v. Keene*, 481 U.S. 465, 473 (1987) ("Whether the statute in fact constitutes an abridgement of the plaintiff's freedom of speech is, of course, irrelevant to the standing analysis.") (internal quotation marks, citations, and alterations omitted). With this characterization of Plaintiffs' alleged injuries in mind, the Court determines that Plaintiffs have sufficiently alleged at least a minimal injury arising from their First Amendment claims, a personal stake in the controversy that is concrete.

Additionally, the Court determines that Plaintiffs have sufficiently alleged injury in fact arising from their equal protection claims. In their respective equal protection claims, Plaintiffs allege that the challenged categories violate their rights to equal protection because the categories treat those who are exercising their First Amendment rights differently from those who are not exercising such rights (Lead Compl. ¶¶ 67-68; Member Compl. ¶¶ 117-122). "The injury in fact in an equal protection case of this variety is the denial of equal treatment resulting from the

imposition of the barrier, not the ultimate inability to obtain the benefit." *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (internal quotation marks and alterations omitted).

VNP's second argument is that Plaintiffs lack standing because their prayer for relief and the present motions for a preliminary injunction show that they are not seeking a remedy that would allow them an opportunity to serve on the new Commission at all, i.e., that Plaintiffs have not suffered an injury "that is likely to be redressed by a favorable judicial decision." *Lujan*, 504 U.S. at 560-61. However, Plaintiffs seek, at least in relevant part, that this Court declare the selection of commissioners a violation of their constitutional rights. The present motion in the Lead Case specifically seeks for Secretary Benson to "suspend her . . . preparations for the selection of commissioners" (ECF No. 4 at PageID.90). A favorable decision in these cases would provide such redress. *Contrast Hearring*, 806 F.3d at 867 (where the plaintiffs "never sought [the] injunction" that was issued).

Thus, the Court concludes that Plaintiffs' Complaints adequately allege Article III standing sufficient to warrant their invocation of federal-court jurisdiction.

2. Laches

Secretary Benson argues that this Court should refuse to entertain Plaintiffs' claims based on application of the doctrine of laches. Secretary Benson emphasizes that the amendment was passed on November 6, 2018, yet the Lead Plaintiffs did not file their Complaint until July 30, 2019 (ECF No. 39 at PageID.569-572). Secretary Benson emphasizes that "this is a case seeking to enjoin the operation of an amendment to the method of drawing electoral districts more than three-quarters of a year after the amendment was passed, and on the eve of mailing applications for citizens to join the Commission" (*id.* at PageID.571). Secretary Benson opines that Plaintiffs' delay prejudices her, as her "interest in proceeding with the election increases in importance" as

the deadline for mailing applications looms (*id.* at PageID.572). Secretary Benson makes essentially the same laches argument in the Member Case, pointing out that the Plaintiffs did not file their complaint until August 22, 2019, almost one month after even the filing of the Lead Case (ECF No. 45 at PageID.665-669).

In reply, the Lead Plaintiffs argue that the doctrine of laches does not apply to their claims because they expressly seek only injunctive relief against ongoing and recurring harm (ECF No. 57 at PageID.832-834). Plaintiffs also assert that their delay in filing was not unreasonable as "the landscape of the Commission has been developing" and that "[t]here can be no prejudice to Defendant where she has unconstitutionally excluded individuals for eligibility" (*id.* at PageID.834-836). The Member Plaintiffs similarly argue that laches is inapplicable to their claims for relief (ECF No. 54 at PageID.779-780).

Secretary Benson's argument lacks merit.

"Where a plaintiff seeks solely equitable relief, his action may be barred by the equitable defense of laches if (1) the plaintiff delayed unreasonably in asserting his rights and (2) the defendant was prejudiced by this delay." *Am. Civil Liberties Union of Ohio, Inc. v. Taft*, 385 F.3d 641, 647 (6th Cir. 2004) (citing *Brown-Graves Co. v. Cent. States, Se. and Sw. Areas Pension Fund*, 206 F.3d 680, 684 (6th Cir. 2000)). Secretary Benson makes a sound argument on both factors. *Cf. Crookston v. Johnson*, 841 F.3d 396, 399 (6th Cir. 2016) (explaining that the plaintiff's "belated challenge to Michigan's election procedures prejudices the State's interest in holding orderly elections").

However, Plaintiffs accurately point out that the doctrine does not prevent a plaintiff from obtaining prospective injunctive relief, which is all that Plaintiffs in these cases seek. "Laches only bars damages that occurred before the filing date of the lawsuit." *Nartron Corp. v.*

STMicroelectronics, Inc., 305 F.3d 397, 412 (6th Cir. 2002). *See also Kuhnle Bros., Inc. v. Cty. of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997) (holding that "a law that works an ongoing violation of constitutional rights does not become immunized from legal challenge" merely because the plaintiff failed to sue within the applicable statute of limitations); *Ohio A. Philip Randolph Inst. v. Smith*, 335 F.Supp.3d 988, 1002 (S.D. Ohio 2018) (three-judge panel holding that laches does not apply as a matter of law to partisan gerrymandering claims).

Therefore, assuming arguendo that Plaintiffs have standing to invoke this Court's jurisdiction and that laches does not bar consideration of their claims, the Court turns to examination of the factors for preliminary injunctive relief in each case.

C. The Lead Case

1. Likelihood of Success on the Merits

a. First Amendment (Count I)

The Lead Plaintiffs argue that they have a strong likelihood of success on the merits of their claim in Count I where the Commission excludes categories of individuals on a basis that infringes their First Amendment rights (ECF No. 4 at PageID.71-74). Plaintiffs argue that they have been denied both a membership benefit and a quantifiable economic benefit (*id.* at PageID.72). Relying on *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), and progeny, Plaintiffs argue that the Commission's conditions and restrictions on employment are unconstitutional because they are not adequately tailored to a sufficient government interest (*id.* at PageID.74-76).

In response, Secretary Benson argues that while Plaintiffs possess fundamental rights to political speech and association, the interests of the State plainly outweigh any burden or infringement of those rights caused by the provisions in § 6 (ECF No. 39 at PageID.547).

According to Secretary Benson, the interest of the State at issue here—establishing a fair and impartial redistricting process—is fundamental (*id.*). Secretary Benson argues that the State has a "compelling" interest in deciding who will be responsible for redistricting in Michigan (*id.* at PageID.550). Secretary Benson points out that the eight ineligibility provisions in Article IV, § 6 (1)(b) were designed "to squeeze every ounce of incumbent and legislative influence out of redistricting" by excluding persons who presently, or have within the last six years, participated in the political operation of Michigan government in a partisan or nonpartisan capacity (*id.* at PageID.552, citing Bruce E. Cain, Redistricting Commission: A Better Political Buffer?, 121 Yale L. J. 1808, 1824 (2012) (discussing California's similar provisions after which Michigan's provisions are modeled)). Secretary Benson delineates how each of the Lead Plaintiffs "has a conflict or may reasonably be perceived as having a conflict of interest based on the office or position he or she currently holds" (*id.* at PageID.559). Secretary Benson argues that in contrast, the burden on Plaintiffs' speech and association rights is both "minimal" and "temporary" where Plaintiffs, as Republicans, are eligible based on their party affiliation to apply for the four Republican seats in the 2030 redistricting cycle (*id.* at PageID.559-561).

In its response to the Lead Plaintiffs' argument, VNP asserts that Michigan's voters did not violate the First Amendment by seeking to guard against conflicts of interest, or the appearance thereof, in drawing the districts from which their representatives would be elected (ECF No. 32 at PageID.361-368). According to VNP, the Sixth Circuit has explained that the First Amendment does not prohibit taking political affiliation into account in "positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies" (*id.* at PageID.366, quoting *Sowards v. Loudon Cnty., Tenn.*, 203 F.3d 426, 436 (6th Cir. 2000)). VNP emphasizes that partisan views

and affiliations may be considered as a qualification for such positions without violating the First Amendment (*id.*). VNP argues that even if the Court could find that Plaintiffs have identified a cognizable First Amendment interest, that interest would be overcome by the state's compelling interest in enforcing the Commission's membership qualifications and prohibiting those with political or financial ties to legislators from drawing the districts that will determine who gets elected (*id.* at PageID.369-370).

The Lead Plaintiffs have not shown a likelihood of success on the merits of Count I.

The Lead Plaintiffs argue that they would be eligible for Commission membership but for the exercise of their First Amendment rights, i.e., that their eligibility has unconstitutional conditions. As the Sixth Circuit recently observed, "[t]he United States Constitution does not contain an Unconstitutional Conditions Clause." *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 911 (6th Cir. 2019). "What it does contain is a series of individual rights guarantees, most prominently those in the first eight provisions of the Bill of Rights and those in the Fourteenth Amendment." *Id.* (ultimately examining the guarantee of due process established by the Fourteenth Amendment). The Supreme Court has held that "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, . . . [it] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Rutan*, 497 U.S. at 85 (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). *See also Planned Parenthood*, 917 F.3d at 911 ("The government may not deny an individual a benefit, even one an individual has no entitlement to, on a basis that infringes his constitutional rights.").

The Lead Plaintiffs identify the allegedly imperiled rights in this case as their rights to "freedom of speech (e.g., by the exclusion of candidates for partisan office or by the activities of

certain relatives), right of association (e.g., by the exclusion of members of political parties or by the activities of certain relatives), and/or the right to petition (e.g., by the exclusion of registered lobbyists or by the activities of certain relatives)" (ECF No. 4 at PageID.73). *See generally Elrod v. Burns*, 427 U.S. 347, 355-58 (1976) ("[P]olitical belief and association constitute the core of those activities protected by the First Amendment.").

The Lead Plaintiffs frame their claim within the context of "conditional hiring decisions" (*see* Compl. ¶¶ 25, 38, 44, citing *Rutan*, 497 U.S. 62 ("low-level" state employees and employment applicants filed § 1983 action alleging that they had suffered discrimination in state employment because they had not been Republican Party supporters and that this discrimination violates the First Amendment); *Vickery v. Jones*, 856 F. Supp. 1313, 1318 (S.D. Ill. 1994) (the plaintiff contended that he was denied a second six-month contract as highway maintainer because of the defendant's patronage system), aff'd, 100 F.3d 1334 (7th Cir. 1996)).

VNP likewise examines Plaintiffs' allegedly imperiled rights within the context of personnel decisions, urging the Court to conclude that policymaking positions—and partisan balance commissions in particular—are "exempt" from the rule precluding personnel decisions based upon partisan or political factors. *See Branti v. Finkel*, 445 U.S. 507, 518 (1980) (two county assistant public defenders brought § 1983 action based on the allegation that the newly appointed public defender for the county was about to discharge the plaintiffs solely because they were Republicans); *Sowards*, 203 F.3d at 436 (former jailer brought § 1983 action against county and sheriff alleging she was terminated in retaliation for exercising her First Amendment rights).

In contrast, Secretary Benson, pointing out that members of Michigan's Independent Citizens Redistricting Commission will be state officers, not state employees (ECF No. 39 at PageID.549, n.10), instead examines Plaintiffs' First Amendment rights within the context of state

election law cases. The Court determines that the election law cases provide the better framework for examining the constitutionality of the criteria for membership on a state redistricting commission. The caselaw examining an employer's discrete hiring decisions does not, in the Court's view, sufficiently encompass the interests at stake in this case. Redistricting "goes to the heart of the political process" in a constitutional democracy. *In re Apportionment of State Legislature—1982*, 321 N.W.2d 565, 581 (Mich. 1982). *See also Rucho*, ___ U.S. at ___; 139 S. Ct. at 2498 ("[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States") (citation omitted).

"First Amendment challenges to state election regulations are evaluated under the three-step *Anderson-Burdick* framework," a framework derived from the holdings in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019) (examining statutes governing Ohio's municipal ballot-initiative process). *Anderson* and *Burdick* "define and limit a State's ability to impose certain types of regulatory procedures relating to the election process." *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 924 (6th Cir. 1998) (examining a Michigan constitutional amendment imposing lifetime term limits on state legislators under the *Anderson-Burdick* balancing test).[3] "[T]he touchstone of *Anderson-Burdick* is its flexibility in weighing competing interests. . ." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) (quoting *Burdick*, 504 U.S. at 434).

[3] Interestingly, the Sixth Circuit in *Citizens for Legislative Choice*, also briefly analyzed the rights and interests involved in the term-limit amendment under a "Deferential Approach," an approach based on a State's sovereign authority to structure its government, concluding that it would also alternatively affirm the decision to grant the State summary judgment under this approach. 144 F.3d at 924-925. Neither side has proposed use of the Deferential Approach in this case, although the Court observes that the authority of the State to determine the qualifications of its elective and nonelective positions underpins the *Anderson-Burdick* balancing of the interests in this case.

Cf. Anderson, 460 U.S. at 787 (examining "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters ... to cast their votes effectively") (citation omitted).

Under the *Anderson-Burdick* framework, courts "weigh the character and magnitude of the burden the State's rule imposes on [Plaintiffs' First Amendment] rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Schmitt*, 933 F.3d at 639 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (citations and internal quotation marks omitted)). The first, most critical step is to consider the severity of the restriction. *Id.* Laws imposing "severe burdens on plaintiffs' rights" are subject to strict scrutiny, but "lesser burdens ... trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* (citations and internal quotation marks omitted). Regulations that fall in the middle "warrant a flexible analysis that weighs the state's interests and chosen means of pursuing them against the burden of the restriction." *Id.* (quoting *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016) (citation and internal quotation marks omitted)). At the second step, courts identify and evaluate the state's interests in and justifications for the regulation. *Id.* The third step requires that courts "assess the legitimacy and strength of those interests" and determine whether the restrictions are constitutional. *Id.*

The eligibility provisions at issue do not impose severe burdens on Plaintiffs' First Amendment rights. There is no right to state office or appointment. The right to become a candidate for state office, like the right to vote for the election of state officers, is a privilege of citizenship. *Snowden v. Hughes*, 321 U.S. 1, 7 (1944). *Cf. Bullock v. Carter*, 405 U.S. 134, 142-43 (1972) ("[T]the Court has not heretofore attached such fundamental status to candidacy as to

invoke a rigorous standard of review."). Nor, as Secretary Benson points out, are the burdens permanent.

In contrast, the State has a compelling interest in deciding who will be responsible for redistricting in Michigan. "As a sovereign polity, Michigan has a fundamental interest in structuring its government." *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 923 (6th Cir. 1998) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). "Any change in the means by which the members of the Legislature are chosen is a fundamental matter." *In re Apportionment of State Legislature—1982*, 321 N.W.2d at 581. A court's scrutiny will not be "so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." *Gregory*, 501 U.S. at 462-63.

And "[t]he reality is that districting inevitably has and is intended to have substantial political consequences." *Gaffney v. Cummings*, 412 U.S. 735 (1973). "Politics and political considerations are inseparable from districting and apportionment." *Id.* In their quest to ensure that the redistricting process can no longer be dominated by one political party, *Citizens Protecting Michigan's Constitution*, 922 N.W.2d at 410, a majority of Michigan voters provided for "the character of those who [will] exercise [the] government authority" of redistricting by prescribing the eligibility requirements for the Commission. *Gregory*, 501 U.S. at 460 (examining a state constitutional provision through which the people of Missouri established a qualification for those who sit as their judges). And the Michigan Constitution requires Commission members to perform their duties "in a manner that is impartial and reinforces public confidence" in the redistricting process. MICH. CONST., Art. 4, § 6 (10).

In sum, when balancing the *Anderson-Burdick* factors, while the First Amendment is a check on the State's authority, the State's interests in designating eligibility criteria for an effective

redistricting commission are more than sufficient to justify the challenged provisions. The Court determines Plaintiffs are therefore unlikely to succeed on the merits of their First Amendment claim in Count I.

b. Equal Protection (Count II)

Plaintiffs argue that they also have a strong likelihood of success on the merits on their Equal Protection claim in Count II because the "exclusionary factors … burden[] only individuals that fall into set categories because of an exercise of First Amendment rights that may indicate partisan bias, while imposing no restriction on individuals who may be just as partisan, or more partisan" (ECF No. 4 at PageID.76, 79). Plaintiffs argue that "the government interest is not a sufficient fit with the restrictions to justify the distinction the challenged provision draws between Plaintiffs and all other eligible registered voters" (*id.* at PageID.76). Plaintiffs argue that "[t]hese exclusions are not justified by the stated interests of implementing a 'fair, impartial, and transparent redistricting process' because excluding Plaintiffs from the Commission cannot be adequately linked to the achievement of those goals" (*id.* at PageID.77, 81).

In response, Secretary Benson argues that there is more than a sufficient rational relationship between the disparate treatment of Plaintiffs and the government's interests (ECF No. 39 at PageID.564). Specifically, Secretary Benson maintains that "the manifest purpose of the amendment is to transfer the power of establishing legislative districts from the legislature and the political parties who dominate it to the hands of citizens without a personal stake in the details of how and where those districts are drawn" (*id.*). Secretary Benson opines that the government's legitimate interest in protecting the legitimacy of the people's chosen redistricting system is a clearly rational reason to exclude these categories of person from the Commission (*id.* at PageID.565). Secretary Benson argues that like other anti-nepotism statutes and restrictions, there

is also a rational basis to exclude certain close family relations of that political class of persons, who can be presumed to have a financial or other interest in the outcome of the redistricting on behalf of their relatives (*id.* at PageID.565-566). Secretary Benson emphasizes that the Lead Plaintiffs' exclusion is not based upon their chosen party affiliation but upon their real or apparent conflicts of interest, i.e., their professional or financial reliance, as to the outcome of the decisions the Commission will be required to make (*id.* at PageID.567-568).

The Lead Plaintiffs have not shown a likelihood of success on the merits of Count II.

The United States Supreme Court has "long held that 'a classification neither involving fundamental rights nor proceeding along suspect lines ... cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 680 (2012) (quoting *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)). For the reasons previously stated, the Lead Plaintiffs are unlikely to succeed in demonstrating that the eligibility criteria impose a severe burden on their First Amendment rights. And the Lead Plaintiffs do not belong to any suspect classification such as race or religion. Per the allegations in their Complaint, the Lead Plaintiffs are partisan candidates or elected officials, political party officers, paid political consultants, legislative employees, lobbyists and/or certain close relatives of the same. For the reasons previously stated and more fully stated by Secretary Benson, the difference in treatment between persons within and outside these eight enumerated categories rationally furthers a legitimate state interest in establishing a fair and impartial redistricting process.

Accordingly, the Lead Plaintiffs have not demonstrated a strong likelihood of success on the merits of either of their claims.[4] This first preliminary injunction factor therefore balances in Defendants' favor.

2. Irreparable Injury

On the second preliminary injunction factor, Plaintiffs argue that absent an injunction, they will suffer irreparable injury by their ineligibility for participation in the Commission (ECF No. 4 at PageID.86). Specifically, they argue that they are "banned from consideration and eligibility for participation in the Commission while also facing the sophie's choice of continuing to exercise their First Amendment rights and participate in the political process, or forego that protected participation in order to someday gain eligibility to participate in the Commission" (*id.* at PageID.87).

Secretary Benson argues that Plaintiffs have not demonstrated any irreparable injury where there is no associational or expression-based exclusion of their viewpoints, because, "by the express terms of the amendment, there will be persons affiliating with their political party on the Commission, and Plaintiffs otherwise remain to affiliate and express their views" (ECF No. 39 at PageID.573-574). Second, Secretary Benson argues that to whatever extent Plaintiffs raise a claim based on "exclusion from state employment," that is not an "irreparable" injury but an injury for which Plaintiffs could receive monetary compensation for the pay they might have received as

[4] Plaintiffs also argue that where the eligibility provisions are unconstitutional, "there is a strong likelihood that the entire Commission will be declared invalid" because the unconstitutional provisions of the amendment are not severable from the remaining provisions regarding the Commission under the precedent and the circumstances presented here, which include the voters' belief that such restrictions were a vital part of the overall proposal (ECF No. 4 at PageID.81-85). Because the Court has determined that Plaintiffs are not likely to succeed on the merits of their constitutional claims, the Court declines, at this juncture, to address the effect of the severability provision.

Commission members (*id.* at PageID.574). Secretary Benson argues that to the extent Plaintiffs allege that they may be unconstitutionally excluded from service on the Commission, applications are not due until June 2020, and there is time enough to fully litigate the issues (*id.*).

VNP argues that the new constitutional language is entitled to a presumption of constitutionality and that there is ample time and opportunity for adjudication of Plaintiffs' claims and enforcement of any relief that might be ordered in this matter (ECF No. 32 at PageID.352).

Again, the remaining factors largely depend on whether a constitutional violation exists. *Libertarian Party*, 751 F.3d at 412. For example, "it is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* (quoting *Elrod*, 427 U.S. at 373). Here, the Court has determined that the Lead Plaintiffs are unlikely to prevail on the merits of their constitutional claims. Further, Defendants' points that the Lead Plaintiffs' injuries are, in fact, not irreparable absent a preliminary injunction are well taken. This factor therefore also balances in Defendants' favor.

3. Substantial Injury & Public Interest

The Lead Plaintiffs briefly argue that granting an injunction will not cause substantial harm to others and is in the public interest (ECF No. 4 at PageID.87-88).

In response, Secretary Benson argues that an injunction will irreparably harm the State inasmuch as any delay in the process will effectively prevent the Secretary from completing the necessary tasks to meet the constitutionally-mandated January 1 deadline for mailing applications and timely complete the random selection process for members of the Commission to, in turn, timely complete their duties (ECF No. 39 at PageID.575). Secretary Benson argues that an injunction will also irreparably harm Michigan's citizens because the challenged constitutional amendment was duly enacted by the Michigan voters as an expression of their will as to whom

they wanted to exercise the power of drawing their electoral districts (*id.*). Secretary Benson argues that the people have a strong interest in having their Constitution effectuated (*id.* at PageID.576).

VNP similarly points out that "in light of the unwarranted disruption of the constitutional process that would be brought about by the requested preliminary injunction, it is also plain that the public interest would not be served by an order granting that relief" (ECF No. 32 at PageID.352).

"[T]he public interest lies in a correct application of the federal constitutional and statutory provisions upon which the claimants have brought this claim and ultimately. . . upon the will of the people of Michigan being effected in accordance with Michigan law." *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (internal quotation and citation omitted). Even if the Court viewed the merits of the Lead Plaintiffs' claims differently, preserving the status chosen by the voters more than one year ago is important as this case progresses through the courts toward final resolution. These last two factors therefore balance in Defendants' favor.

In sum, the Court, in its discretion, determines that awarding the kind of relief that the Supreme Court has characterized as "extraordinary" and "drastic," *Munaf*, 553 U.S. at 690; *Platt*, 769 F.3d at 454, is not justified in this case. Rather, the Court denies the Lead Plaintiffs' motion for a preliminary injunction.

D. The Member Case

1. Likelihood of Success on the Merits

a. Freedom of Association (Count I)

In support of the merits of MRP's Freedom of Association claim in Count I, the Member Plaintiffs rely heavily on the Supreme Court's decision in *California Democratic Party v. Jones*,

530 U.S. 567 (2000), and the right of a political party to select its "standard bearers" and exclude persons from membership (Member Case, ECF No. 3 at PageID.57-60; Member Compl. ¶ 72, ECF No. 1 at PageID.16; ECF No. 54 at PageID.739-741). Plaintiffs argue that like the challenged provision in *Jones,* a California proposition that converted the state's primary election from a closed to a blanket primary, the challenged provisions in this case similarly violate the rights to associate and not to associate because "applicants for commissioner self-designate their affiliation with one of the two major political parties without any involvement or consent of that political party" (Member Case, ECF No. 3 at PageID.60). Plaintiffs argue that the challenged provisions will "result in a situation where those who do not represent MRP's interests are selected as Republican commissioners" (*id.*).

In response, Secretary Benson argues that Plaintiffs' claim that the commissioners will be their "standard bearers" and representatives is based upon a fundamental misunderstanding of what the Commission is and who its members will be: "Commissioners are not party nominees or candidates, and so they are not chosen to be party standard bearers or to deliver the party's message" (ECF No. 45 at PageID.636-639). Secretary Benson emphasizes that the point of the movement driven by "Voters Not Politicians" was to have the districts drawn by the voters, rather than legislators or political insiders; therefore, the enacted provisions do not require that the applicants be actual *members* of any party—they need only attest to whether they affiliate themselves with a party (*id.* at PageID.638-639 [emphasis in original]). Secretary Benson also points out that the MRP has not alleged that it has, or could properly develop, a process to prevent or exclude people from voting for its candidates or claiming affinity with MRP (*id.* at PageID.640). Last, Secretary Benson points out that the MRP has remedies to pursue if it believes an individual is attempting to perpetrate some fraud in his or her application (*id.* at PageID.641).

In response, VNP argues that the commissioner selection process does not violate MRP's freedom of association (ECF No. 36 at PageID.456-461). VNP points out that unlike a political party's nominee for elected office, a commissioner on Michigan's independent redistricting commission does not "determine[ ] the party's positions on the most significant public policy issues of the day" or "become[ ] the party's ambassador to the general electorate in winning it over to the party's views" (*id.* at PageID.458, quoting *Jones*, 530 U.S. at 575). Nor, argues VNP, are redistricting commissioners tasked with being "a standard bearer who best represents the party's ideologies and preferences" (*id.*, quoting *Jones, supra*). VNP emphasizes that the contrary is instead true—"the voters of Michigan determined that commissioners should be prohibited from seeking to advantage political parties in adopting redistricting plans" (*id.*, citing MICH. CONST. Article IV § 6(13)(d) ("Districts shall not provide a disproportionate advantage to any political party."")). VNP concludes that "political parties have no First Amendment associational right to dictate the membership of government commissions" (*id.* at PageID.459).

The Member Plaintiffs have not shown a likelihood of success on the merits of Count I.

"[T]he freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments." *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973) (citations omitted). "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Id.*

In *Jones*, 530 U.S. at 577, the Supreme Court held that California's blanket primary unconstitutionally "forces political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." Here, however, unlike the provision in *Jones*, neither

the Michigan constitutional amendment nor membership in the Commission defines what it means to be a Republican or a Democrat. As a result, *Jones* is simply inapplicable. Further, because the position of redistricting commissioner is randomly drawn from pools of voters, there is no basis for the commissioners to be regarded as "standard bearers" for the parties. Rather, as Secretary Benson powerfully indicates, "Commissioners will be drawn from the same people to whom the parties will later appeal to *vote for* those standard bearers and representatives" (ECF No. 45 at PageID.640 [emphasis in original]).

b. Freedom of Association (Count II)

In the individual Plaintiffs' Freedom of Association claim in Count II, the Member Plaintiffs allege that they express their political affiliation with the Michigan Republican Party through one or more of the roles described in the Commission's disqualifying criteria (Member Compl. ¶ 81, ECF No. 1 at PageID.19). The Member Plaintiffs argue that the criteria are "overly broad" and create a prospective "total bar to service" on the Commission based on *past* political activities, regardless whether those political activities would continue during the individual's term of office (Member Case, ECF No. 3 at PageID.62-64 [emphasis in original]; *see also* ECF No. 54 at PageID.745).

In response, Secretary Benson argues that the Member Plaintiffs' argument on the merits of Count II also "misses the mark" (ECF No. 45 at PageID.642). Like her argument in the Lead Case, Secretary Benson argues that while the individual Plaintiffs in the Member Case possess a fundamental right to freedom of association, the interests of the State plainly outweigh any burden or infringement of those rights caused by the provisions in § 6 (*id.* at PageID.644). According to Secretary Benson, the interest of the State at issue here—establishing a fair and impartial redistricting process—is fundamental (*id.*). Secretary Benson argues that the State has a

"compelling" interest in deciding who will be responsible for redistricting in Michigan (*id.* at PageID.644). Secretary Benson reiterates that the ineligibility provisions were designed "to squeeze every ounce of incumbent and legislative influence out of redistricting" by excluding persons who presently, or have within the last six years, participated in the political operation of Michigan government in a partisan or nonpartisan capacity (*id.*). Secretary Benson delineates how each individual Plaintiff in the Member Case "has a conflict or may reasonably be perceived as having a conflict of interest based on the office or position he or she currently holds" (*id.* at PageID.647-649). Last, Secretary Benson argues that the burden on Plaintiffs' association rights is both "minimal" and "temporary" where Plaintiffs, as Republicans, are eligible based on their party affiliation to apply for the four Republican seats in the 2030 redistricting cycle (*id.* at PageID.649-650).

VNP similarly responds that the Commission's qualification requirements do not violate the individual Plaintiffs' First Amendment freedom of association (ECF No. 36 at PageID.462). VNP argues that the individual Plaintiffs are also particularly wrong to contend that they face a "total bar to service on the commission" where their conflicts of interest only preclude their service for a period of six years after the relevant activity ends (*id.* at PageID.463, citing MICH. CONST. Article IV § 6(1)(b) and *Clements v. Fashing*, 457 U.S. 957, 967 (1982) (explaining that "[a] 'waiting period' is hardly a significant barrier to candidacy" and that it had previously "upheld a 7-year durational residency requirement for candidacy")).

The Member Plaintiffs have not shown a likelihood of success on the merits of Count II.

For the reasons previously stated by the Court and more fully stated by Defendants, while the First Amendment is a check on the State's authority, the State's interests in designating

eligibility criteria for an effective redistricting commission are, on balance, more than sufficient to justify the challenged provisions.

c. Freedom of Speech—Viewpoint Discrimination (Count III)

The Member Plaintiffs' Count III focusses on the composition of the Commission, specifically challenging that "[a]pplicants who affiliate with one of the two major parties, including MRP, are disfavored because only four positions are reserved to each of the pools of affiliating applicants, while five positions are reserved to the pool of unaffiliating applicants" (Member Compl. ¶ 94, ECF No. 1 at PageID.20). The Member Plaintiffs argue that "through the specific allocation of commissioner seats based on party affiliation—*a minority of which are reserved to each of the major political parties*—the VNP Proposal seeks to suppress speech and expression motivated by Republican ideologies and perspectives, while enhancing the perspectives of commissioners who are unaffiliated with either major party by allocating more seats to that pool of applicants" (Member Case, ECF No. 3 at PageID.66 [emphasis in original]).

In response, Secretary Benson argues that the amendment does not impose any kind of viewpoint discrimination (ECF No. 45 at PageID.653). Secretary Benson argues that Plaintiffs err in reducing the non-affiliated Commission seats to being "independent" seats, and Secretary Benson asserts that the MRP is not disadvantaged by having four members affiliated with it, as opposed to five members affiliating with all other groups and no group at all (*id.* at PageID.654). Secretary Benson also argues that a close review of the language of the amendment shows that the number of commissioners in each of the three groups has little effect on the relative power those groups will have in the Commission's decisions (*id.* at PageID.654-655). Last, Secretary Benson opines that the Member Plaintiffs' argument is ambiguous as to what "viewpoint" they claim is affected by the composition of the Commission (*id.* at PageID.655-656).

VNP similarly argues that the Commission's allocation of seats does not constitute viewpoint discrimination in violation of the First Amendment (ECF No. 36 at PageID.464). VNP argues that the Member Plaintiffs' contention that the Commission's structure suppresses Republican views while enhancing the views of those unaffiliated with the parties is factually inaccurate (*id.* at PageID.465-466). According to VNP, Plaintiffs misconceive the role of commissioners: the commissioners are not tasked with engaging in "speech and expression" to advance certain "ideologies and perspectives" (*id.* at PageID.466, quoting Pls. Brief, ECF No. 3 at PageID.66); instead, commissioners are legally obligated *not* to draw districts to favor ideologies and perspectives because that is "the very ill the Commission was designed to eliminate" (*id.* at PageID.466, citing MICH. CONST. Art. IV, § 6 (13)(d) [emphasis in original]).

The Member Plaintiffs have not shown a likelihood of success on the merits of Count III.

The government may not discriminate against speech based on the ideas or opinions the speech conveys. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995) (explaining that viewpoint discrimination is an "egregious form of content discrimination" and is "presumptively unconstitutional"). In support of the merits of their viewpoint discrimination claim, the Member Plaintiffs rely heavily on a sentence from *McCutcheon v. FEC*, 572 U.S. 185, 207 (2014) (citation omitted), where the Supreme Court stated that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment" (Member Case, ECF No. 3 at PageID.66). At issue in *McCutcheon* was the statutory aggregate limits on how much a donor may contribute in total to political candidates or committees. The Supreme Court previously upheld the base limits as serving the permissible objective of combatting corruption, but a majority of the *McCutcheon*

Court concluded that the aggregate limits violated the First Amendment because they "do little, if anything, to address that concern, while seriously restricting participation in the democratic process." *Id.* at 193.

The Member Plaintiffs' viewpoint-discrimination claim in this case is simply misplaced. For the reasons stated more fully by Defendants, the allocation of seats on the Commission does not reflect the State's disapproval of a subset of speech. Moreover, even if the "viewpoint" that is the focus of Count III is simply that of "Republican" affiliation, then their claim is still unlikely to succeed because there is no discrimination. Members affiliated with the Republican party have the same number of members as the Democratic affiliation and more members than those reserved for those who maintain affiliation with any other party.

d. Freedom of Speech—Restricted Speech (Count IV)

The Member Plaintiffs' Count IV focusses on the open-meeting requirement of the new § 6, which instructs that commissioners "shall not discuss redistricting matters with members of the public outside of an open meeting of the commission" except to gain relevant information, if such communication occurs either "in writing" or "at a previously publicly noticed forum or town hall open to the general public." MICH. CONST. Art. IV, § 6 (11). The Member Plaintiffs argue that the open-meeting requirement, which prohibits discussion of "an entire topic" with no compelling governmental justification, is an unconstitutional restraint on the commissioners' First Amendment freedom of speech (Member Case, ECF No. 3 at PageID.67-70; ECF No. 54 at PageID.758). The Member Plaintiffs point out that Michigan's Open Meetings Act, which requires that members of a public body deliberate toward and render decisions in an open meeting, already establishes a less restrictive alternative to the VNP Proposal (Member Case, ECF No. 3 at PageID.70).

In response, Secretary Benson argues that this claim is seriously compromised by significant legal defects, including lack of standing by the Member Plaintiffs—non-commissioners—to raise this claim and the fact that the restriction applies only to the official speech of State officials and employees, which the State may properly regulate (ECF No. 45 at PageID.656-660). Secretary Benson points out that the restriction does not impose a blanket ban; rather, commissioners remain free to discuss the operation of the Commission as a body and may discuss redistricting with the public so long as they are gathering information from the public and doing so in writing or in a public forum (*id.* at PageID.660).

VNP argues that the restriction on commissioners' discussion of redistricting outside of public Commission meetings, a time-place-manner regulation, does not violate the First Amendment but plainly promotes a substantial government interest, to wit: the furtherance of transparency and trust that line-drawing decisions are not made for improper, corrupt, or discriminatory purposes; the promotion of public confidence in the process that determines the very structure of the electoral process; and the assurance that all commissioners are involved in the decision-making (ECF No. 36 at PageID.469-472).

The Member Plaintiffs have not shown a likelihood of success on the merits of Count IV.

Even assuming arguendo that the Member Plaintiffs may properly raise this claim, the First Amendment rights of public officials, such as the future commissioners, are not absolute. "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (citation omitted). The restriction at issue applies only to official speech made by commissioners in their official capacity. "Restricting speech that owes its existence to a public employee's professional responsibilities

does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Garcetti*, 547 U.S. at 421-22 (citing *Rosenberger*, 515 U.S. at 833 ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes")).

e. Equal Protection (Count V)

Last, the Member Plaintiffs argue that they are likely to succeed on the merits of their Equal Protection claim because the "arbitrary" and "invidious" distinctions drawn by the challenged provisions are neither justified by a compelling government interest nor narrowly tailored to achieve that purpose (Member Case, ECF No. 3 at PageID.70-73).

Secretary Benson responds that the composition of the Commission does not violate Equal Protection (ECF No. 45 at PageID.662). Reiterating her arguments in the Lead Case, Secretary Benson argues that there is more than a sufficient rational relationship between the disparate treatment of the Member Plaintiffs and the government's interests (*id.* at PageID.663-665).

The Member Plaintiffs have not shown a likelihood of success on the merits of Count V.

Again, "a classification neither involving fundamental rights nor proceeding along suspect lines ... cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" *Armour*, 566 U.S. at 680 (quoting *Heller*, 509 U.S. at 319-20). The Member Plaintiffs are unlikely to succeed in demonstrating that the eligibility criteria impose a severe burden on their First Amendment rights. And the Member Plaintiffs do not belong to any suspect classification such as race or religion. Per the allegations in their Complaint, the Member Plaintiffs are partisan candidates or elected

officials, political party officers, and/or certain close relatives of the same. For the reasons previously stated by the Court and more fully stated by Secretary Benson, the difference in treatment between persons within and outside these categories rationally furthers a legitimate state interest.

Accordingly, the Member Plaintiffs have not demonstrated a strong likelihood of success on the merits of their five claims.[5] This first preliminary injunction factor therefore balances in Defendants' favor.

2. Irreparable Injury

The Member Plaintiffs briefly argue that absent an injunction, they will suffer irreparable injury by their ineligibility for participation in the Commission (ECF No. 3 at PageID.73).

Secretary Benson argues that the Member Plaintiffs have not demonstrated any irreparable injury where there is no associational or expression-based exclusion of their viewpoints (ECF No. 45 at PageID.669). Second, Secretary Benson argues that to whatever extent Plaintiffs raise a claim based on their exclusion, applications are not due until June 2020, and there is time enough to fully litigate the issues (*id.*).

VNP similarly argues that Plaintiffs have not made the necessary showing of irreparable injury where the earliest date that Plaintiffs' rights could be impacted, if at all, is June 1, 2020, the date after which the Secretary of State will no longer accept applications (ECF No. 36 at PageID.472-473). VNP asserts that simply put, "there is no reason to grant a preliminary

[5] The Member Plaintiffs argue that they are likely to succeed on the merits of their claims where (1) the challenged provisions "prohibit[] a substantial amount of protected expression and speech," and (2) the challenged provisions are "inextricably intertwined" and cannot be severed (ECF No. 3 at PageID.55). Given the Court's conclusion on the merits of the Member Plaintiffs' constitutional argument, the Court declines to address their argument on severability.

injunction pending a final resolution on the merits when the merits are so easily resolved before the alleged irreparable harm could ever arise" (*id.* at PageID.473).

The Court has determined that the Member Plaintiffs are unlikely to prevail on the merits of their constitutional claims. Further, Defendants' points that the Member Plaintiffs' injuries are, in fact, not irreparable absent a preliminary injunction are well taken. This factor therefore also balances in Defendants' favor.

3. Substantial Injury & Public Interest

The Member Plaintiffs argue that because they have shown a likelihood of success on the merits of their claims, Secretary Benson and any third party are precluded from credibly asserting that any purported harm to others or the public weighs against issuance of a preliminary injunction in this case (ECF No. 3 at PageID.74). According to the Member Plaintiffs, "there is none" (*id.*).

Secretary Benson again argues that an injunction will irreparably harm the State inasmuch as any delay in the process will effectively prevent the Secretary from completing her constitutionally-mandated tasks and will also irreparably harm Michigan's citizens in halting the expression of their collective will (ECF No. 45 at PageID.670). Secretary Benson argues that the people have a strong interest in having their Constitution effectuated (*id.*).

VNP argues that the public's interest in the proper implementation of the challenged constitutional procedure is "especially strong because the adoption of that procedure was accomplished by the clearly expressed will of the people, as manifested by the 61% vote in favor of Proposal 18-2" (ECF No. 36 at PageID.474-475).

Again, "the public interest lies in a correct application of the federal constitutional and statutory provisions upon which the claimants have brought this claim and ultimately. . . upon the will of the people of Michigan being effected in accordance with Michigan law." *Coalition to*

Defend Affirmative Action, 473 F.3d at 252 (internal quotation and citation omitted). Even if the Court viewed the merits of the Member Plaintiffs' claims differently, preserving the status chosen by the voters more than one year ago is important as this case progresses through the courts toward final resolution. These last two factors therefore balance in Defendants' favor.

In sum, the Court, in its discretion, determines that awarding the kind of relief that the Supreme Court has characterized as "extraordinary" and "drastic," *Munaf*, 553 U.S. at 690; *Platt*, 769 F.3d at 454, is also not justified in this case. Rather, the Court denies the Member Plaintiffs' motion for a preliminary injunction.

III. CONCLUSION

For the foregoing reasons, a balancing of the equities weighs against preliminarily enjoining Secretary Benson from implementing the voter-approved provisions of Michigan's Constitution mandating the establishment of an Independent Citizens Redistricting Commission. An Order will enter consistent with this Opinion.

Dated: November 25, 2019

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY DAUNT, et al.,

Plaintiffs,

v.

JOCELYN BENSON, et al.,

Defendants.

Case No. 1:19-cv-614
(Lead)

MICHIGAN REPUBLICAN PARTY, et al.,

Plaintiffs,

v.

JOCELYN BENSON, et al.,

Defendants.

Case No. 1:19-cv-669
(Member)

HON. JANET T. NEFF

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ORDER

In accordance with the Opinion entered this date:

IT IS HEREBY ORDERED that Plaintiffs' Motion for Preliminary Injunction (Lead Case, ECF No. 4) is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Preliminary Injunction (Member Case, ECF No. 2) is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for a Status Conference (ECF No. 64) is DENIED as moot.

Dated: November 25, 2019

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

STATE CONSTITUTION (EXCERPT)
CONSTITUTION OF MICHIGAN OF 1963

§ 6 Independent citizens redistricting commission for state legislative and congressional districts.

Sec. 6. (1) An independent citizens redistricting commission for state legislative and congressional districts (hereinafter, the "commission") is hereby established as a permanent commission in the legislative branch. The commission shall consist of 13 commissioners. The commission shall adopt a redistricting plan for each of the following types of districts: state senate districts, state house of representative districts, and congressional districts. Each commissioner shall:

(a) Be registered and eligible to vote in the State of Michigan;

(b) Not currently be or in the past 6 years have been any of the following:

(i) A declared candidate for partisan federal, state, or local office;

(ii) An elected official to partisan federal, state, or local office;

(iii) An officer or member of the governing body of a national, state, or local political party;

(iv) A paid consultant or employee of a federal, state, or local elected official or political candidate, of a federal, state, or local political candidate's campaign, or of a political action committee;

(v) An employee of the legislature;

(vi) Any person who is registered as a lobbyist agent with the Michigan bureau of elections, or any employee of such person; or

(vii) An unclassified state employee who is exempt from classification in state civil service pursuant to article XI, section 5, except for employees of courts of record, employees of the state institutions of higher education, and persons in the armed forces of the state;

(c) Not be a parent, stepparent, child, stepchild, or spouse of any individual disqualified under part (1)(b) of this section; or

(d) Not be otherwise disqualified for appointed or elected office by this constitution.

(e) For five years after the date of appointment, a commissioner is ineligible to hold a partisan elective office at the state, county, city, village, or township level in Michigan.

(2) Commissioners shall be selected through the following process:

(a) The secretary of state shall do all of the following:

(i) Make applications for commissioner available to the general public not later than January 1 of the year of the federal decennial census. The secretary of state shall circulate the applications in a manner that invites wide public participation from different regions of the state. The secretary of state shall also mail applications for commissioner to ten thousand Michigan registered voters, selected at random, by January 1 of the year of the federal decennial census.

(ii) Require applicants to provide a completed application.

(iii) Require applicants to attest under oath that they meet the qualifications set forth in this section; and either that they affiliate with one of the two political parties with the largest representation in the legislature (hereinafter, "major parties"), and if so, identify the party with which they affiliate, or that they do not affiliate with either of the major parties.

(b) Subject to part (2)(c) of this section, the secretary of state shall mail additional applications for commissioner to Michigan registered voters selected at random until 30 qualifying applicants that affiliate with one of the two major parties have submitted applications, 30 qualifying applicants that identify that they affiliate with the other of the two major parties have submitted applications, and 40 qualifying applicants that identify that they do not affiliate with either of the two major parties have submitted applications, each in response to the mailings.

(c) The secretary of state shall accept applications for commissioner until June 1 of the year of the federal decennial census.

(d) By July 1 of the year of the federal decennial census, from all of the applications submitted, the secretary of state shall:

(i) Eliminate incomplete applications and applications of applicants who do not meet the qualifications in parts (1)(a) through (1)(d) of this section based solely on the information contained in the applications;

(ii) Randomly select 60 applicants from each pool of affiliating applicants and 80 applicants from the pool of non-affiliating applicants. 50% of each pool shall be populated from the qualifying applicants to such pool who returned an application mailed pursuant to part 2(a) or 2(b) of this section, provided, that if fewer than 30 qualifying applicants affiliated with a major party or fewer than 40 qualifying non-affiliating applicants have applied to serve on the commission in response to the random mailing, the balance of the pool shall be populated from the balance of qualifying applicants to that pool. The random selection process used by the

secretary of state to fill the selection pools shall use accepted statistical weighting methods to ensure that the pools, as closely as possible, mirror the geographic and demographic makeup of the state; and

(iii) Submit the randomly-selected applications to the majority leader and the minority leader of the senate, and the speaker of the house of representatives and the minority leader of the house of representatives.

(e) By August 1 of the year of the federal decennial census, the majority leader of the senate, the minority leader of the senate, the speaker of the house of representatives, and the minority leader of the house of representatives may each strike five applicants from any pool or pools, up to a maximum of 20 total strikes by the four legislative leaders.

(f) By September 1 of the year of the federal decennial census, the secretary of state shall randomly draw the names of four commissioners from each of the two pools of remaining applicants affiliating with a major party, and five commissioners from the pool of remaining non-affiliating applicants.

(3) Except as provided below, commissioners shall hold office for the term set forth in part (18) of this section. If a commissioner's seat becomes vacant for any reason, the secretary of state shall fill the vacancy by randomly drawing a name from the remaining qualifying applicants in the selection pool from which the original commissioner was selected. A commissioner's office shall become vacant upon the occurrence of any of the following:

(a) Death or mental incapacity of the commissioner;

(b) The secretary of state's receipt of the commissioner's written resignation;

(c) The commissioner's disqualification for election or appointment or employment pursuant to article XI, section 8;

(d) The commissioner ceases to be qualified to serve as a commissioner under part (1) of this section; or

(e) After written notice and an opportunity for the commissioner to respond, a vote of 10 of the commissioners finding substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office.

(4) The secretary of state shall be secretary of the commission without vote, and in that capacity shall furnish, under the direction of the commission, all technical services that the commission deems necessary. The commission shall elect its own chairperson. The commission has the sole power to make its own rules of procedure. The commission shall have procurement and contracting authority and may hire staff and consultants for the purposes of this section, including legal representation.

(5) Beginning no later than December 1 of the year preceding the federal decennial census, and continuing each year in which the commission operates, the legislature shall appropriate funds sufficient to compensate the commissioners and to enable the commission to carry out its functions, operations and activities, which activities include retaining independent, nonpartisan subject-matter experts and legal counsel, conducting hearings, publishing notices and maintaining a record of the commission's proceedings, and any other activity necessary for the commission to conduct its business, at an amount equal to not less than 25 percent of the general fund/general purpose budget for the secretary of state for that fiscal year. Within six months after the conclusion of each fiscal year, the commission shall return to the state treasury all moneys unexpended for that fiscal year. The commission shall furnish reports of expenditures, at least annually, to the governor and the legislature and shall be subject to annual audit as provided by law. Each commissioner shall receive compensation at least equal to 25 percent of the governor's salary. The State of Michigan shall indemnify commissioners for costs incurred if the legislature does not appropriate sufficient funds to cover such costs.

(6) The commission shall have legal standing to prosecute an action regarding the adequacy of resources provided for the operation of the commission, and to defend any action regarding an adopted plan. The commission shall inform the legislature if the commission determines that funds or other resources provided for operation of the commission are not adequate. The legislature shall provide adequate funding to allow the commission to defend any action regarding an adopted plan.

(7) The secretary of state shall issue a call convening the commission by October 15 in the year of the federal decennial census. Not later than November 1 in the year immediately following the federal decennial census, the commission shall adopt a redistricting plan under this section for each of the following types of districts: state senate districts, state house of representative districts, and congressional districts.

(8) Before commissioners draft any plan, the commission shall hold at least ten public hearings throughout the state for the purpose of informing the public about the redistricting process and the purpose and responsibilities of the commission and soliciting information from the public about potential plans. The commission shall receive for consideration written submissions of proposed redistricting plans and any supporting materials, including underlying data, from any member of the public. These written submissions are public records.

(9) After developing at least one proposed redistricting plan for each type of district, the commission shall publish the proposed redistricting plans and any data and supporting materials used to develop the plans. Each

commissioner may only propose one redistricting plan for each type of district. The commission shall hold at least five public hearings throughout the state for the purpose of soliciting comment from the public about the proposed plans. Each of the proposed plans shall include such census data as is necessary to accurately describe the plan and verify the population of each district, and a map and legal description that include the political subdivisions, such as counties, cities, and townships; man-made features, such as streets, roads, highways, and railroads; and natural features, such as waterways, which form the boundaries of the districts.

(10) Each commissioner shall perform his or her duties in a manner that is impartial and reinforces public confidence in the integrity of the redistricting process. The commission shall conduct all of its business at open meetings. Nine commissioners, including at least one commissioner from each selection pool shall constitute a quorum, and all meetings shall require a quorum. The commission shall provide advance public notice of its meetings and hearings. The commission shall conduct its hearings in a manner that invites wide public participation throughout the state. The commission shall use technology to provide contemporaneous public observation and meaningful public participation in the redistricting process during all meetings and hearings.

(11) The commission, its members, staff, attorneys, and consultants shall not discuss redistricting matters with members of the public outside of an open meeting of the commission, except that a commissioner may communicate about redistricting matters with members of the public to gain information relevant to the performance of his or her duties if such communication occurs (a) in writing or (b) at a previously publicly noticed forum or town hall open to the general public.

The commission, its members, staff, attorneys, experts, and consultants may not directly or indirectly solicit or accept any gift or loan of money, goods, services, or other thing of value greater than $20 for the benefit of any person or organization, which may influence the manner in which the commissioner, staff, attorney, expert, or consultant performs his or her duties.

(12) Except as provided in part (14) of this section, a final decision of the commission requires the concurrence of a majority of the commissioners. A decision on the dismissal or retention of paid staff or consultants requires the vote of at least one commissioner affiliating with each of the major parties and one non-affiliating commissioner. All decisions of the commission shall be recorded, and the record of its decisions shall be readily available to any member of the public without charge.

(13) The commission shall abide by the following criteria in proposing and adopting each plan, in order of priority:

(a) Districts shall be of equal population as mandated by the United States constitution, and shall comply with the voting rights act and other federal laws.

(b) Districts shall be geographically contiguous. Island areas are considered to be contiguous by land to the county of which they are a part.

(c) Districts shall reflect the state's diverse population and communities of interest. Communities of interest may include, but shall not be limited to, populations that share cultural or historical characteristics or economic interests. Communities of interest do not include relationships with political parties, incumbents, or political candidates.

(d) Districts shall not provide a disproportionate advantage to any political party. A disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness.

(e) Districts shall not favor or disfavor an incumbent elected official or a candidate.

(f) Districts shall reflect consideration of county, city, and township boundaries.

(g) Districts shall be reasonably compact.

(14) The commission shall follow the following procedure in adopting a plan:

(a) Before voting to adopt a plan, the commission shall ensure that the plan is tested, using appropriate technology, for compliance with the criteria described above.

(b) Before voting to adopt a plan, the commission shall provide public notice of each plan that will be voted on and provide at least 45 days for public comment on the proposed plan or plans. Each plan that will be voted on shall include such census data as is necessary to accurately describe the plan and verify the population of each district, and shall include the map and legal description required in part (9) of this section.

(c) A final decision of the commission to adopt a redistricting plan requires a majority vote of the commission, including at least two commissioners who affiliate with each major party, and at least two commissioners who do not affiliate with either major party. If no plan satisfies this requirement for a type of district, the commission shall use the following procedure to adopt a plan for that type of district:

(i) Each commissioner may submit one proposed plan for each type of district to the full commission for consideration.

(ii) Each commissioner shall rank the plans submitted according to preference. Each plan shall be assigned a point value inverse to its ranking among the number of choices, giving the lowest ranked plan one point and

the highest ranked plan a point value equal to the number of plans submitted.

(iii) The commission shall adopt the plan receiving the highest total points, that is also ranked among the top half of plans by at least two commissioners not affiliated with the party of the commissioner submitting the plan, or in the case of a plan submitted by non-affiliated commissioners, is ranked among the top half of plans by at least two commissioners affiliated with a major party. If plans are tied for the highest point total, the secretary of state shall randomly select the final plan from those plans. If no plan meets the requirements of this subparagraph, the secretary of state shall randomly select the final plan from among all submitted plans pursuant to part (14)(c)(i).

(15) Within 30 days after adopting a plan, the commission shall publish the plan and the material reports, reference materials, and data used in drawing it, including any programming information used to produce and test the plan. The published materials shall be such that an independent person is able to replicate the conclusion without any modification of any of the published materials.

(16) For each adopted plan, the commission shall issue a report that explains the basis on which the commission made its decisions in achieving compliance with plan requirements and shall include the map and legal description required in part (9) of this section. A commissioner who votes against a redistricting plan may submit a dissenting report which shall be issued with the commission's report.

(17) An adopted redistricting plan shall become law 60 days after its publication. The secretary of state shall keep a public record of all proceedings of the commission and shall publish and distribute each plan and required documentation.

(18) The terms of the commissioners shall expire once the commission has completed its obligations for a census cycle but not before any judicial review of the redistricting plan is complete.

(19) The supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their respective duties, may review a challenge to any plan adopted by the commission, and shall remand a plan to the commission for further action if the plan fails to comply with the requirements of this constitution, the constitution of the United States or superseding federal law. In no event shall any body, except the independent citizens redistricting commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state.

(20) This section is self-executing. If a final court decision holds any part or parts of this section to be in conflict with the United States constitution or federal law, the section shall be implemented to the maximum extent that the United States constitution and federal law permit. Any provision held invalid is severable from the remaining portions of this section.

(21) Notwithstanding any other provision of law, no employer shall discharge, threaten to discharge, intimidate, coerce, or retaliate against any employee because of the employee's membership on the commission or attendance or scheduled attendance at any meeting of the commission.

(22) Notwithstanding any other provision of this constitution, or any prior judicial decision, as of the effective date of the constitutional amendment adding this provision, which amends article IV, sections 1 through 6, article V, sections 1, 2 and 4, and article VI, sections 1 and 4, including this provision, for purposes of interpreting this constitutional amendment the people declare that the powers granted to the commission are legislative functions not subject to the control or approval of the legislature, and are exclusively reserved to the commission. The commission, and all of its responsibilities, operations, functions, contractors, consultants and employees are not subject to change, transfer, reorganization, or reassignment, and shall not be altered or abrogated in any manner whatsoever, by the legislature. No other body shall be established by law to perform functions that are the same or similar to those granted to the commission in this section.

History: Const. 1963, Art. IV, § 6, Eff. Jan. 1, 1964;—Am. Init., approved Nov. 6, 2018, Eff. Dec. 22, 2018.

Compiler's note: The constitutional amendment set out above was submitted to, and approved by, the electors as Proposal 18-2 at the November 6, 2018 general election. This amendment to the Constitution of Michigan of 1963 became effective December 22, 2018.

Constitutionality: The United States Supreme Court held in *Reynolds v Sims*, 377 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964) that provisions establishing weighted land area-population formulae violate the Equal Protection Clause of the United States Constitution. Because the apportionment provisions of former art IV, §§ 2 - 6 are interdependent and not severable, the provisions are invalidated in their entirety and the Commission on Legislative Apportionment cannot survive. In re Apportionment of State Legislature—1982, 413 Mich 96; 321 NW2d 565 (1982), rehearing denied 413 Mich 149; 321 NW2d 585; stay denied 413 Mich 222; 321 NW2d 615, appeal dismissed 459 US 900; 103 S Ct 201; 74 L Ed 2d 161.

Transfer of powers: See MCL 16.132.