UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY DAUNT, *et al.*, Plaintiffs, v. JOCELYN BENSON, in her official Capacity as Michigan Secretary of State, Defendant.	Case No. 1:19-cv-614 **Oral argument requested**

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Anthony Daunt, Tom Barrett, Aaron Beauchine, Kathy Berden, Stephen Daunt, Gerry Hildenbrand, Gary Koutsoubos, Linda Lee Tarver, Patrick Meyers, Marian Sheridan, Mary Shinkle, Norm Shinkle, Paul Sheridan, Bridget Beard, and Clint Tarver, (collectively, "Plaintiffs"), by and through their attorneys, respectfully move this Court for a preliminary injunction as set out below and for the reasons set out in the accompanying Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction. Fed. R. Civ. P. 65(a). Because there are only legal questions at issue, Plaintiffs respectfully request that this Court consolidate the preliminary injunction hearing with the trial on the merits and rule on the merits in accordance

with Fed. R. Civ. P. 65(a)(2).

WHEREFORE, Plaintiffs respectfully request the Court grant their Motion and issue a preliminary injunction pending a decision on the merits of Plaintiffs' claims in this matter.

Dated: July 30, 2019

Respectfully submitted,

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Through the establishment of the Michigan Citizens Redistricting Commission ("Commission"), Plaintiffs have been targeted because of their partisan and non-partisan political affiliations. This targeting infringes upon Plaintiffs' federal constitutional rights of free speech and association. 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 (6th Cir. 1998) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (plurality)); *see also Elrod*, 427 U.S. at 373; *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989); *N.Y. Times v. United States*, 403 U.S. 713, 715 (1971) (Black, J., concurring). Accordingly, Plaintiffs have a strong likelihood of success on the merits, will suffer irreparable injury without an injunction, and an injunction will not substantially injure others while furthering the public interest. This Court should, therefore, grant Plaintiffs' request for a preliminary and permanent injunction.

FACTS

Every 10 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. The Michigan State Legislature was tasked with redrawing Michigan's congressional and state legislative district boundaries until November 2018. Redistricting plans, like any other law, were adopted if approved by a majority vote in both chambers of the state legislature and subsequently signed by the

Governor. The state legislature last approved new congressional district boundaries on June 29, 2011, and the governor signed them into law on August 9, 2011.[1]

On December 18, 2017, the ballot-question committee Voters Not Politicians ("VNP") filed an initiative petition with the Secretary of State that proposed amending the Michigan Constitution to establish the Commission, within the legislative branch, tasked with developing and adopting a redistricting plan for state legislative and federal congressional districts every ten years.[2] The Commission would replace the existing legislative process and eliminate any legislative oversight of the redistricting process.

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

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[1] The 2011 redistricting plan is the subject of ongoing litigation in the United States District Court for the Eastern District of Michigan. *See League of Women Voters of Michigan v. Benson*, No. 2:17-cv-14148 (E.D. Mich. filed Dec. 27, 2017). In December 2017, the League of Women Voters of Michigan filed suit in federal court alleging that Michigan's congressional and state legislative district plans represented unconstitutional partisan gerrymanders. In April 2019, the court ruled that 34 congressional and state legislative districts had been subject to unconstitutional partisan gerrymandering. The court also found that 27 of the 34 challenged districts violated the plaintiffs' First and Fourteenth Amendment rights by diluting the impact of their votes. *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019) (three-judge court). The district court's ruling is currently being appealed by state officials. On May 10, 2019, the state officials petitioned the Supreme Court for a stay of the lower court's ruling pending the appeal. *See* Congressional and State House Intervenors' Emergency Application for Stay, *Chatfield v. League of Women Voters of Mich.,* No. 18A1171 (U.S. filed May 10, 2019). The Supreme Court granted the stay on May 24, 2019. *Id.*

[2] The text of the initiative petition is available at https://www.michigan.gov/documents/sos/Full_Text_-_VNP_635257_7.pdf.

ballot.[3]

Ballot Proposal 18-2 stated:

> *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.

[3] *See* Michigan Department of State, State of Michigan Statewide Ballot Proposals Status and Full Text November 6, 2018 General Election (2018), https://www.michigan.gov/documents/sos/Bal_Prop_Status_560960_7.pdf. Prior to the certification by the Board of State Canvassers, the Citizens Protecting Michigan's Constitution (CPMC) filed a complaint with the Michigan Court of Appeals seeking a writ of mandamus directing the Secretary of State and the Board to reject the VNP proposal because it wasn't appropriately considered a constitutional amendment that could be approved by petition. *Citizens Protecting Mich.'s Constitution v. Sec'y of State*, 922 N.W.2d 404 (Mich. Ct. App. 2018). The Court of Appeals rejected plaintiffs' requested relief and ordered the Secretary of State and the Board to take all necessary measures to place the proposal on the general election ballot. *Id*. The Michigan Supreme Court affirmed the Court of Appeals decision. *Citizens Protecting Mich.'s Constitution v. Sec'y of State*, 761 N.W.2d 210 (Mich. 2018).

- 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

Board of State Canvassers, *Official Ballot Wording approved by the Board of State Canvassers August 30, 2018 Voters Not Politicians* (2019), https://www.michigan.gov/documents/sos/Official_Ballot_Wording_Prop_18-2_632052_7.pdf.

Michigan voters approved the ballot proposal on November 6, 2018, and the Michigan Constitution was amended according to the revised language that accompanied the ballot proposal.

The amended Michigan Constitution sets forth specific details of the Commission including the application process, eligibility criteria, and process for seeking and selecting commissioners.

The Michigan Secretary of State is required to mail applications to at least 10,000 randomly selected registered voters encouraging them to apply. Mich. Const. art 4, § 6 (2)(A). The Secretary of State's office will randomly select 200 finalists from among the

qualified applicants: 60 who self-identify as Republicans, 60 who self-identify as Democrats and 80 who self-identify as not affiliated 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). Applications to serve on the Commission must be made available from January 1, 2020 through June 1, 2020. *Id.* at § 6 (2)(A), (C). Commissioners must be selected by September 1, 2020. *Id.* at § 6 (2)(F).

A person must be registered and eligible to vote in Michigan to be eligible to serve on the Commission. *Id.* at § 6 (1)(A). Further, 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). In addition, "for 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).

In July 2019, the Secretary of State released draft text of the application to serve as a commissioner on its website and invited the public to comment until August 9, 2019. App. A. 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.* The draft 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 … ":

(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 her website, for public comment until August 9, 2019, draft Commissioner Eligibility Guidelines. App. B. The draft guidelines provide clarification on the scope of the categories of individuals excluded from eligibility to serve on the Commission. 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 *non-partisan* 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 4, § 6 (18). Commissioners receive compensation equal to at least 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. *Id.* at § 6 (5).

The Secretary of State serves as Secretary of the Commission. Though she has no vote, she has a significant role in administering the Commission, including furnishing the Commission with all technical services that the Commission deems necessary. *Id.* at § 6 (4).

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. *Id.* at § 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. *Id.* at § 6 (13).

ARGUMENT

Plaintiffs seek a preliminary injunction to prevent the Michigan Secretary of State, and her employees and agents, from administering or preparing for the

selection of commissioners to serve on the Commission pending a determination of the constitutionality of the Commission by this Court. "The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *United Food Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998) (citing *Stenberg v. Checker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978)).

A district court must balance four factors in determining whether to grant a preliminary injunction: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Bays v. City of Fairborn*, 668 F.3d 814, 818-19 (6th Cir. 2012) (citing *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007)). This is a flexible standard where the four factors are not prerequisites but instead are balanced by the Court. *Frisch's Rest., Inc. v. Shoney's Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985) (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

> [T]he purpose of the [balance of harms] test is . . . to underscore the flexibility which traditionally has characterized the law of equity. It permits the district court, in its discretion, to grant a preliminary injunction even where the plaintiff fails to show a strong or substantial probability of ultimate success on the merits of his claim, but where he at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if the injunction is issued.

Jones v. Caruso, 569 F.3d 258, 277 (6th Cir. 2009) (alteration in original) (quoting *Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 104 (6th Cir. 1982)). *See also Worthington Foods, Inc. v. Kellogg Co.*, 732 F. Supp. 1417, 1427 (S.D. Ohio 1990) ("That is, a strong showing of irreparable harm, decidedly outweighing harm to the defendant, may justify an injunction even where the movant cannot make a strong showing of likelihood of success on the merits, as long as the plaintiff can show serious questions going to the merits of the suit.") (citing *Frisch's*, 759 F.2d at 1263; *DeLorean*, 755 F.2d at 1229); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) ("If the showing in one area is particularly strong, an injunction may issue even if the showings in other areas are rather weak.").

"[W]hen 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.* 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 the government is a defendant. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Applying these principles to the facts of this case, leads inevitably to the conclusion that this court should grant Plaintiffs' request for a preliminary injunction.

There are no contested facts here. Attached as Exhibit 1 are the affidavits of Plaintiffs. Each explain how they are prohibited by one or more of the restrictions. The Defendants cannot seriously make an argument that they are contesting any of these statements the Plaintiffs make about themselves. As a result, this case is appropriate for consolidation of the preliminary injunction and hearing on the merits pursuant to Fed. R. Civ. P. 65(a)(2).

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR COMPLAINT

To satisfy the first prong of the preliminary injunction analysis, Plaintiffs are not required to demonstrate that they *will* succeed on the merits at trial. Nor are Plaintiffs required to demonstrate that they will *probably* succeed on the merits of their claims. Plaintiffs 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). 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 (6th Cir. 1974) (citing

American Federation of Musicians v. Stein, 213 F.2d 679, 683 (6th Cir. 1954), *cert. denied*, 348 U.S. 873, 75 S. Ct. 108, 99 L. Ed. 687 (1954)). "It will ordinarily be enough 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 mere deliberate investigation." *Id.* (citing *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2nd Cir. 1953)). Plaintiffs' constitutional claims meet this standard.

A. The Commission Excludes Categories of Individuals Based on Their Exercise of Constitutionally Protected Speech and Associations

For at least a quarter-century, 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. Repub. Party*, 497 U.S. 62, 86 (1990). The government may not deny benefits to people in a way that infringes their constitutionally protected interests, especially freedom of speech. "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 v. Randall,* 357 U.S. 513, 526 (1957)). Such interference with constitutional rights is impermissible." *Id.*

In applying these principles, the Supreme Court has recognized that

government positions, such as commissioner, convey a valuable government benefit. The most obvious of these benefits are specific quantifiable economic benefits. In this case, each commissioner receives a salary from the State "at least equal to 25 percent of the governor's salary", which was reportedly $159,300 as of January 2018.[4] Mich. Const. art 4, § 6 (5). Thus, a commissioner receives at least $39,825 in monetary compensation. Moreover, courts have recognized that quantifiable economic worth is not the only valuable benefit derived from a government position. In considering whether membership on a government advisory committee denied the excluded applicant any benefit, "the D.C. Circuit recognized that a benefit need only have value to those who seek it[]" and "because the . . . membership did have value to plaintiff, withholding this benefit could pressure plaintiffs into forgoing the exercise of their constitutional rights." *Autor v. Blank*, 128 F. Supp. 3d 331, 334 (D.D.C. 2015) (citing *Autor v. Pritzker*, 740 F.3d 176, 182 (D.C. Cir. 2014)). Thus, Plaintiffs—who each desire to serve on the Commission but are excluded from consideration—have been denied a benefit.

Further, Plaintiffs 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

[4] *See* Abigail Hess, *The 5 states with the highest and lowest paid politicians,* CNBC: MAKE IT (Jan 25, 2018 10:47 AM), https://www.cnbc.com/2018/01/25/the-5-states-with-the-highest-and-lowest-paid-politicians.html.

Constitution and therefore are excluded from eligibility based on their exercise of one or more of their 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," 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 opinion) (*quoting Kusper v. Pontikes*, 414 U.S. 51, 57 (1973) (citing *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)).

[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, as in *Board of Education v. Barnette,* 319 U.S. 624 (1943), 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).

Accordingly the operation of the Commission excludes categories of individuals based on their exercise of constitutionally protected conduct.

B. <u>The Commission's Conditions and Restrictions on Employment are Unconstitutional Because They are Not Adequately Tailored to a Sufficient Government Interest</u>

The exclusion of certain categories of individuals from eligibility to serve on the Commission acts as an unconstitutional condition on employment because it is not adequately tailored to the 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."[5] *Vickery v. Jones,* 856 F. Supp. 1313, 1322 (S.D. Ill. 1994).

In this case, VNP stated that the relevant government interest was to create a "a fair, impartial, and transparent process where voters - not politicians - will draw Michigan's state Senate, state House, and Congressional election district maps."[6] With regard to the exclusion of the eight categories of individuals from eligibility to serve,

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[5] 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.

[6] *We Ended Gerrymandering in Michigan*, Voters Not Politicians, https://votersnotpoliticians.com/redistricting/ (last visited July 26, 2019).

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."[7]

In 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, the State has unconstitutionally conditioned eligibility for a valuable benefit on their willingness to limit their First Amendment right to petition government. *See Adams v. Governor of Delaware*, No. 18-1045 (3d Cir. 2019) (Plaintiff's freedom of association rights were violated by a political balance requirement that prevented his application to Delaware's Supreme Court, Superior Court, and Chancery Court); *Autor*, 740 F.3d at 179.

The exclusionary factors also violate the Equal Protection Clause because it burdens 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. 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.

[7] *Id.* (emphasis added).

Plaintiffs have a First Amendment right to associate freely with each other, to participate in the political process and express their political views, and to petition the government for a redress of grievances, without discrimination by the State based on their exercise of these rights. The exclusion of eight categories of Michigan citizens from eligibility to serve on the Commission substantially burdens First Amendment rights by denying the benefit of state employment to individuals whose exercise of those rights triggers one of the eight excluded categories.

These 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. While other aspects of the Commission can logically be connected to those goals (*e.g.*, 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 be convincingly so connected.

VNP explains that Plaintiffs are banned from serving on the Commission because they are the "most likely" to have a conflict of interest in the redistricting

process. This assumption, which appears to be an attempt to get to the core of impartiality, erroneously assumes that it is only elected officials and candidates and people who have been engaged in other political activities or lobbying, and those somehow directly 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. As a result, 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 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.

Further, it is inappropriate to single out Plaintiffs based on perceived impartiality because the Commission itself is not designed to be impartial. Rather, it is designed to be an amalgam of a variety of views across the political spectrum. That Plaintiffs' 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 as to how Plaintiffs' participation 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 even stronger, but do not happen to belong to one of the excluded categories of people.

Thus, the Government has no legitimate basis on which to condition Plaintiffs' eligibility to serve on the Commission 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. This categorical exclusion of Plaintiffs 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.

The Fourteenth Amendment's Equal Protection Clause prohibits the provisions of the Michigan Constitution that exclude categories of individuals from being eligible to serve on the Commission denies Plaintiffs a benefit available to others on account of their exercise of fundamental rights that are expressly protected by the First Amendment. For example, the eligibility restriction draws an unconstitutional distinction between those who exercise their rights of association and rights to petition the government and those who do not. As the Supreme Court stated

in *Police Dep't of Chicago v. Mosley,* "[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). Here, this standard is not met. For example, the restriction 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 imposes no sanction at all on other individuals whose lobbying activities are much more extensive than those subject to the policy, including those who structure their time so as not to cross the registration thresholds. Further, the Secretary of State has explained in draft guidance that paid employees of an elected official, political candidate, campaign, or political action committee are excluded form eligibility, volunteers may be eligible to serve on the Commission because they are not paid for their services. See App. B. And 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 *non-partisan* local political candidate's campaign since August 15, 2014 may not be eligible to serve on the Commission. *Id.* And, 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 constitutional shortcomings of the exclusionary categories created by the constitutional amendments that created and control the Commission.

Finally, as described above, the classifications on which this exclusion is based is not meaningfully tied to apparent State interests in promoting transparency, fairness, and impartiality in the redistricting process.

For all these reasons, the Plaintiffs have been and will continue to be unconstitutionally deprived of the equal protection of the law.

C. The Entire Commission Should Be Declared Invalid Because the Unconstitutional Provisions are Not Severable

Not only are Plaintiffs likely to succeed on the merits of their constitutional challenge to the specific provisions of the Michigan constitution that result in their exclusion, but there is a strong likelihood that the entire Commission will be declared invalid.

The Michigan legislature has enacted a general severability statute with respect to legislation that instructs:

> If any portion of an act . . . shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

MICH. COMP. LAWS § 8.5. The Michigan Supreme Court has affirmed this standard, focusing on whether severing a particular provision "is not inconsistent with the manifest intent of the legislature[.]" *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38,* 806 N.W. 2d 683, 714 (Mich. 2011) (quoting 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. *Id.* at 713. The Sixth Circuit 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 extraordinarily challenging because none of the information traditionally used to determine intent is present in this context. While courts can look to the legislative record in interpreting statutes, there is no comparable record of amendments or debate for a successful ballot initiative beyond the binary vote on election day. Thus, if a portion of a ballot proposal is declared unlawful it is difficult to determine whether the electorate would have enacted the ballot proposal without the invalid provision or provisions.

In *In re Apportionment of State Legislature-1982*, 321 N.W.2d 565 (Mich. 1982), the Michigan Supreme Court had to decide whether Michigan's 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 against severability, holding that the commission was inseparable from the unconstitutional standards because 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. The court reached this conclusion, in part, because the majority believed that such a decision properly belonged to the people of Michigan and *not* to the court. *Id.* at 138. As the court noted, 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.

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 which 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.

Similarly, 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 because 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.*

1. But the fundamental question in any severability inquiry, no matter the form of the enactment at issue, 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. The Court, in ruling against severability, affirmed that a severability inquiry "is essentially an inquiry into legislative 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.).

2. The vast number of people participating in the vote for a ballot initiative makes an inquiry into popular intent *more* difficult than an inquiry into legislative or executive intent, and that scarcity of evidence should encourage judicial modesty. Here, however, the wording of Ballot Proposal 2 specifically states 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* (2019), https://www.michigan.gov/documents/sos/Official_Ballot_Wording_Prop_18-2_632052_7.pdf. Further, the language of the accompanying draft amendments 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.[8] Thus, 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 order to accomplish the stated objective of "prohibit[ing] partisan[s] . . . from serving as commissioners." This supports the conclusion that the voters, when they supported the ballot proposal, believed that such restrictions were a vital part of the overall proposal, and thus not severable. To the extent that there is not enough information to draw conclusions about voter intent, under the precedent and the circumstances presented here, it is similarly not appropriate to sever those unconstitutional aspects of the amendment from the remaining provisions regarding the Commission.

Accordingly, Plaintiffs' have a strong likelihood of success on the merits, and this factor balances heavily in Plaintiffs' favor.

[8]Voters Not Politicians, *Official Full Text for Proposal 18-2 Initiative Petition Amendment to the Constitution*, https://www.michigan.gov/documents/sos/Official_Ballot_Wording_Prop_18-2_632052_7.pdf.

II. PLAINTIFFS WILL SUFFER IRREPARABLE INJURY ABSENT AN INJUNCTION

If this Court does not grant this injunction, Plaintiffs, and those similarly situated to them, will suffer irreparable injury by their ineligibility for participation in the Commission.

It is well-settled that even minimal loss of First Amendment freedoms, "unquestionably constitutes irreparable injury." *Connection Distrib. Co.*, 154 F.3d at 288 (quoting *Elrod*, 427 U.S. at 373,); *Elrod*, 427 U.S. at 373(1976); *Newsom*, 888 F.2d at 378; *Accord, e.g.*, *Bonnell v. Lorenzo*, 241 F.3d 800, 809-10 (6th Cir. 2001); *Schicke v. Dilger*, 2017 U.S. App. Lexis 27024 *6-7 (6th Cir. 2017). *See also N.Y. Times,* 403 U.S. at 715. 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.

Id. Under these circumstances, the Court agreed with the Court of Appeals holding that "Inasmuch 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." *Elrod*, F.2d, at 1136. The Court further stated that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373-74 (citing *N.Y. Times*, 427 U.S. at 374).

Here, Plaintiffs are *already* being excluded from eligibility based on their exercise of constitutionally protected activity. Far from a minimal burden, Plaintiffs are being 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. Plaintiffs are stuck between a rock and a hard place, without a path to exercise their constitutional rights. Therefore, Plaintiffs' constitutional rights are not only threatened but are actively being injured. Without injunctive relief, Plaintiffs' injury will continue. The die will be cast, and once the makeup of the Commission is finalized, Plaintiffs' harms will become irreparable.

Accordingly, Plaintiffs will suffer irreparable injury absent an injunction and this factor balances heavily in Plaintiffs' favor.

III. GRANTING AN INJUNCTION WILL NOT CAUSE SUBSTANTIAL HARM TO OTHERS AND IS IN THE PUBLIC INTEREST

The questions of harm to others and serving the public interest are inversely proportional to the likelihood of success on the merits. *Nken*, 556 U.S. at 435. In cases

where harms are claimed on both sides, the Court should look to the merits. The primary factor showing irreparable harm to Plaintiffs, *i.e.*, the denial of their constitutional rights, also shows why the public interest is furthered by an injunction. *See id.* (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 v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (internal quotation and citation omitted).

Consequently, the public interest here 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 12. 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), the public interest is served by ensuring that 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 the Commission is not scheduled to be selected until next year, *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 residents interested in being involved in the redistricting process." Devon Culham, *Secretary of State launches 'Redistricting Michigan' web portal*, DETROIT METRO TIMES, (Mar. 28, 2019).[9] Further, the web portal states that the Secretary of State is "in the process of developing an application and detailed instructions for how and when to apply" and that applications to serve on the Commission will be made available "later this year." Once applications are made available, the Michigan Secretary of State is required to 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). And the selection process will be completed no later than September 1, 2020. *Id.*; Mich. Const. art 4 at § 6(2)(A), (C). Thus, the public interest lies in a avoiding this potentially wasteful use of limited State resources.

[9] https://www.metrotimes.com/news-hits/archives/2019/03/28/secretary-of-state-launches-redistricting-michigan-web-portal

This Court should therefore issue a preliminary injunction while the case is being litigated.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' Motion for Preliminary Injunction and 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.

Dated: July 30, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been filed on July 30 2019, via the CM/ECF system, and that the foregoing has been served by hand delivery on Defendant.

/s/ John J. Bursch

CERTIFICATE OF COMPLIANCE

This document was prepared using Microsoft Word 2019. The word count for the brief provided by the word-processing software is 7,072, which is more than the 4,300-word limit for briefs filed in support of a nondispositive motion. Accordingly, Plaintiffs are filing herewith a motion for an enlargement of the word limit.

/s/ John J. Bursch