UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY DAUNT, et al,

Plaintiffs,

v

JOCELYN BENSON,

Defendant,

COUNT MI VOTE (d/b/a Voters Not Politicians),

Intervening-Defendant.

No. 1:19-cv-00614
(Lead)

HON. JANET T. NEFF

MAG. ELLEN S. CARMODY

MICHIGAN REPUBLICAN PARTY, et al,

Plaintiffs,

v

JOCELYN BENSON,

Defendant,

COUNT MI VOTE (d/b/a Voters Not Politicians),

Intervenor-Defendant.

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

HON. JANET T. NEFF

MAG. ELLEN S. CARMODY

DEFENDANT SECRETARY OF STATE JOCELYN BENSON'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION IN CASE NO. 19-00614

John J. Bursch (P57679)
Attorney for Plaintiffs Daunt et al
9339 Cherry Valley SE, #78
Caledonia, Michigan 49316
616.450.4235

Eric E. Doster (P41782)
Attorney for Plaintiffs
2145 Commons Pkwy
Okemos, Michigan 48864
517.977.0147

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659

Graham Crabtree (P31590)
Attorney for Voters Not Politicians
123 W. Allegan, Ste 1000
Lansing, Michigan 48933
517.377.0895

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Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: meingasth@michigan.gov
(P55439)

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CONCISE STATEMENT OF ISSUE PRESENTED

1. Whether Plaintiffs' motion for preliminary injunctive relief should be denied where a balancing of the equities weighs against enjoining Secretary Benson from implementing the new provisions of Michigan's Constitution mandating the establishment of an Independent Citizens Redistricting Commission.

Politician (noun)

pol·i·ti·cian | \ ˌpä-lə-ˈti-shən

1. a person experienced in the art or science of government *especially*: one actively engaged in conducting the business of a government

2. a. a person engaged in party politics as a profession

b. *often disparaging*: a person primarily interested in political office for selfish or other narrow usually short-sighted reasons[1]

INTRODUCTION

Michigan citizens determined it was vital to retake control over the redistricting process from the state Legislature and place it in the hands of ordinary voters, not politicians. The reason for this seizure is plain and was recently proven; the Legislature, by engaging in unconstitutional partisan gerrymandering, failed to undertake redistricting in adherence to core constitutional principles requiring fair and effective representation for all Michigan's citizens. *League of Women Voters, et al. v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019). The U.S. Supreme Court's decision in *Rucho v. Common Cause* does not change the merits of that result. 139 S. Ct. 2484, 2506 (2019) (recognizing that "[e]xcessive partisanship in districting leads to results that reasonably seem unjust" but holding that partisan gerrymandering questions are non-justiciable).

To combat the effects of "excessive partisanship" in redistricting, the people of Michigan conferred this fundamental power upon an Independent Citizens

[1] Definition from Merriam Webster Online Dictionary, at https://www.merriam-webster.com/dictionary/politician?src=search-dict-box.

Redistricting Commission. A remedy expressly noted by the Court in *Rucho*. 139 S. Ct. at 2507. The composition and selection of its members was designed to eliminate undue political influence in the drawing of district lines. The amendment does so by rendering ineligible to serve on the Commission individuals, like Plaintiffs, whose participation would otherwise raise a conflict of interest.

Their exclusion is thus not based on their political association or politically expressive activity. Rather, Plaintiffs – partisan elected officials, party leaders, employees or consultants of politicians, a lobbyist, and several immediate family members – are excluded because their private interest conflict with the public duty of the Commission to draw fair and impartial district lines.

The State has a compelling interest in deciding both how and who will be responsible for redistricting in Michigan. The exclusions plainly further that interest by ensuring that those now charged with redistricting are not compromised by political considerations. And any temporary burden on Plaintiffs' constitutional rights is minimal. Thus, on balance, the ineligibility provisions do not violate Plaintiffs' First and Fourteenth Amendment rights.

Because Plaintiffs have no likelihood of success on the merits of their constitutional claims, their request for injunctive relief must be denied.

STATEMENT OF FACTS

A. Redistricting in Michigan before Proposal 2

Before addressing the new amendments, it is helpful to know a little of Michigan's redistricting history. In 1963, the people of Michigan enacted through the new Constitution a process for apportionment, now generally referred to as redistricting. *See* Mich. Const. 1963, Art. 4, §§ 2-6 (as enacted). The Constitution created the Commission on Legislative Apportionment and charged that commission with establishing House and Senate districts in conformity with certain standards prescribed by the Constitution. *Id.* If the commission failed to approve a plan, the proposed plans were to be submitted to the Michigan Supreme Court for its review and approval of the plan that best met the constitutional criteria. *Id.*

The commission consisted of "eight electors, four of whom shall be selected by the state organizations of each of the two political parties whose candidates for governor received the highest vote at the last general election at which a governor was elected preceding each apportionment." *Id.* Each political party, however, was required to choose members from four prescribed geographic areas. *Id.* And the Constitution rendered ineligible from serving on the commission "officers or employees of the federal, state or local governments," and thereafter precluded commission members from "election to the legislature until two years after the apportionment plan in which they participated" became effective. *Id.*

The Secretary of State served as the non-voting "secretary" of the commission and provided the commission with "all necessary technical services." The

commission made its own rules and procedures and was to "receive compensation provided by law." And the Legislature was required to "appropriate funds to enable the commission to carry out its activities." *Id.*

Shortly after the enactment of these constitutional provisions, the U.S. Supreme Court in *Reynolds v. Sims*, declared apportionment criteria similar to that in Michigan's Constitution to be unconstitutional. 377 U.S. 533 (1964). The Michigan Supreme Court ordered the Commission on Legislative Apportionment to establish a plan consistent with *Reynolds*, which the commission failed to do, and the Michigan Supreme Court thereafter ordered the commission to adopt the one plan that was based on appropriate standards. *In re Apportionment of State Legislature-1964*, 128 N.W.2d 722 (1964).

In 1972, the commission again failed to agree on a plan, and the Michigan Supreme Court was again called upon to review the plans and to order the commission to approve the plan that best met the constitutional criteria. *In re Apportionment of State Legislature–1972*, 197 N.W.2d 249 (1972). Likewise, in 1982 the commission again failed to agree upon a plan, and the competing plans were submitted to the Michigan Supreme Court. *In re Apportionment of State Legislature–1982*, 321 N.W.2d 565, 571 (1982). This time, however, the Michigan Supreme Court ordered the commission to address whether it and the Court continued to have authority to act in light of the constitutional invalidity of some of the apportionment criteria. *Id.* The Court ultimately held that the valid rules were "inextricably interdependent and therefore [ ] not severable" from the invalid rules,

and that "the function of the commission, which depends on those rules, and indeed the commission itself, [were] not severable from the invalidated rules." *Id*. at 572. The Court thus ordered the former director of elections for Michigan to draw a plan consistent with standards articulated by the Court, which the Court would review and approve after a public hearing. *Id*. at 583.

Due to the invalidity of the constitutional apportionment provisions, the next three redistricting plans – 1991[2], 2001, and 2011 – were drawn by the Legislature. In 2017, a lawsuit was filed in federal court challenging the 2011 plan, *see* Mich. Comp. Laws §§ 3.51a, 4.2001a, and 4.2002a, as an unconstitutional partisan gerrymander, s*ee League of Women Voters*, 373 F. Supp. 3d 867.[3]

B. Redistricting in Michigan after Proposal 2

Also in 2017, Intervening Defendant Voters Not Politicians (VNP), a ballot proposal committee, filed with the Secretary of State an initiative petition to amend the Michigan Constitution signed by more than 425,000 voters. *See Citizens Protecting Michigan's Constitution v. Secretary of State, et al.*, 922 N.W2d 404, 409-410 (Mich. Ct. App. 2018). The proposal principally sought to amend the apportionment provisions in article 4, § 6 discussed above. A challenge to the placement of the proposal on the November 2018 general election ballot was

[2] The Michigan Supreme Court ended up approving a plan for the 1991 cycle as well. *See In re Apportionment of State Legislature–1992*, 483 N.W.2d 52 (1992) and *In re Apportionment of State Legislature–1992*, 486 N.W.2d 639 (1992).

[3] The term "partisan gerrymandering" describes "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, ___U.S.___, 135 S. Ct. 2652, 2658 (2015).

rejected by the Michigan Court of Appeals, *id.* at 433-434, and that rejection was affirmed by the Michigan Supreme Court, *Citizens Protecting Michigan's Constitution v. Secretary of State, et al.*, 921 N.W.2d 247, 270-278 (Mich. 2019).

Identified as Proposal 18-2 on the November 6, 2018, general election ballot, the proposal passed overwhelmingly with 61.28% of electors voting on the proposal in favor of passage and 38.72% voting against passage.[4] The amendments became effective December 22, 2018. *See* Mich. Const. 1963, Art. 12, § 2.

1. Functions of the Independent Citizens Redistricting Commission

The amendments re-establish a commission – now the Independent Citizens Redistricting Commission – charged with redrawing Michigan's congressional and state legislative districts according to specific criteria. Mich. Const. 1963, Art. 4, § 6(1), (13). The amendments prescribe eligibility requirements and a complex selection process for membership on the Commission. *Id.*, § 6(1)–(2). The Commission is granted authority to provide for its own rules and processes, and the Legislature must appropriate money to compensate the commissioners and to enable the Commission to perform its functions. *Id.*, § 6(4)-(5). The Secretary of State acts as a non-voting secretary to the Commission, and "in that capacity shall furnish, under the direction of the commission, all technical services that the commission deems necessary." *Id.*, § 6(4). The Commission must hold public hearings both before and after drafting plans, and ultimately approve a plan for

[4] 2018 Michigan Election Results, available at https://mielections.us/election/results/2018GEN_CENR.html.

each district. *Id.*, § 6(8)-(9), (14). The Michigan Supreme Court may review a challenge to any plan adopted by the Commission. *Id.*, § 6(19).

2. Selection of the Independent Citizens Redistricting Commission

Plaintiffs' concerns center on the make-up of the Commission. As amended, article 4, § 6 requires the Commission to consist of 13 commissioners (rather than the previous 8 members). *Id.*, § 6(1). The 13 commissioners must include 4 commissioners who affiliate with the Republican Party, four commissioners who affiliate with the Democratic Party, and 5 commissioners who do not affiliate with either major party. *Id.*, § 6(2)(f).[5] (The former apportionment commission had 4 members each of the two major parties, and no unaffiliated members). In order to meet this requirement, and to funnel applicants into the right pools, persons applying to the Commission must complete an application and "attest under oath . . . either that they affiliate with one of the two political parties with the largest representation in the legislature . . . and if so, identify the party with which they affiliate, or that they do not affiliate with either of the major parties." *Id.*, § 6(2)(a)(ii)-(iii).

Completed applications then undergo a random selection process using a weighted statistical method to ensure that applicants drawn for each pool geographically and demographically mirror the makeup of the State. *Id.*, § 6(2)(d).

[5] Section 6 does not specifically refer to the Republican Party or the Democratic Party, but refers to the "major parties" with the "largest representation in the legislature." Mich. Const. 1963, Art. 4, § 6(2)(a)(iii).

The randomly selected applications for each pool must then be submitted to the majority and minority leaders of the Michigan House and the Michigan Senate, who "may each strike five applicants from any pool or pools, up to a maximum of 20 total strikes by the four legislative leaders." *Id.*, § 6(2)(d)(iii), (e). After that, the Secretary of State "shall randomly draw the names of four commissioners for each of the two pools of remaining applications affiliating with a major party, and five commissioners from the pool of remaining non-affiliating applicants." *Id.*, § 6(2)(f).

Once selected, each commissioner holds office until the Commission has completed the redistricting process for the applicable census cycle. *Id.*, § 6(18). Each commissioner must "perform his or her duties in a manner that is impartial and reinforces public confidence in the integrity of the redistricting process." *Id.*, § 6(10). The Commission must conduct its business at open meetings and encourage public participation, *id.*, § 6(10), but commissioners "shall not discuss redistricting matters with members of the public outside of an open meeting of the commission," unless certain exceptions apply, *id.*, § 6(11). Also, commissioners "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 . . . performs his or her duties." *Id.*, § 6(11).

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." *Id.*, § 6(14)(c). This means that at least 7 members must vote to approve a plan, 2 Republicans, 2 Democrats, 2 unaffiliated commissioners, and one more commissioner of any category. If no plan is approved in this manner, a plan will be randomly selected under a ranked point system. *Id.*, § 6(14)(c).

To be eligible for selection to the Commission an applicant must be a registered voter eligible to vote in Michigan, *id.*, § 6(1)(a), and not be otherwise disqualified from holding an elective or appointive office under another provision of the Michigan Constitution, *id.*, § 6(1)(d), or under article 4, § 6, as amended. Thus, persons associating with any political party (major or minor), or persons who associate with no party at all, are eligible to apply to the Commission.

Section 6, however, renders ineligible an individual from serving as a commissioner if, within the last 6 years, the person was or is:

> (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 [11], 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[.] [*Id.*, § 6(1)(a), (b)(i)–(vii).][6]

Section 6 further renders ineligible "a parent, stepparent, child, stepchild, or spouse of any individual disqualified under" the quoted provisions. *Id.*, § 6(1)(c).

Those applying for the Commission must "attest under oath that they meet the qualifications" described above. *Id.*, § 6(2)(a)(iii). The Secretary of State must "[e]liminate . . . applications of applicants who do not meet the qualifications in parts (1)(a) through (1)(d) of [§ 6] based solely on the information contained in the applications." *Id.*, § 6(2)(d)(i). (This provision does not apply to the attestation of party or no-party affiliation, which is required under § 6(2)(a)(iii)).

On July 18, 2019, Secretary Benson published draft application language and draft eligibility guidelines for review and public comment.[7] Although the public comment process is not required by article 4, § 6, Secretary Benson wanted to encourage citizen participation and transparency in this new process vital to the functioning of Michigan government.[8] Creating the application form, however, is the Secretary of State's obligation under § 6(2)(a), and providing guidance regarding the terminology used in § 6(1)(a)-(d) is consistent with this obligation. The draft eligibility guidelines address each of the qualifications and look to ordinary dictionary definitions as well as statutory language in the Michigan Election Law

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[6] Certain of these exclusions echo former § 6, which prohibited "officers and employees of the federal, state, or local governments" from serving on the former apportionment commission. Mich. Const. 1963, Art. 4, § 6 (as enacted).
[7] July 18, 2019, press release, available at https://www.michigan.gov/sos/0,4670,7-127-1640_9150-502216--m_2019_7,00.html.
[8] *Id.*

and Michigan Campaign Finance Act to provide an applicant with guidance as to whether he or she is eligible to apply to the Commission. (R. 4-1, Ex. A, PageID.93-99; R. 4-2, Ex. B, PageID.100-109).

C. Plaintiffs are persons ineligible to serve on the Independent Citizens Redistricting Commission

Plaintiffs allege that they are all 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. (Doc. 1, Compl., ¶ 2, PageID.3).

1. Declared candidate for partisan office

Plaintiff Aaron Beauchine became a declared Republican candidate for Ingham County Commission on March 15, 2018. (Doc. 1, Compl., ¶ 9, PageID.5; Doc. 4-3, Beauchine Dec., ¶ 5, PageID.117).

2. Elected official to partisan office

Plaintiff Tom Barrett became a declared candidate in September 2017 and was elected as a Republican to the Michigan Senate in November 2018, and his term of office began January 1, 2019. (Doc. 1, Compl., ¶ 8, PageID.5; Doc. 4-3, Barrett Dec., ¶ 5, PageID.114).

Several Plaintiffs also serve as elected Republican precinct delegates: Plaintiff Linda Tarver, *id.*, ¶ 14, PageID.6; Plaintiff Mary Shinkle, *id.*, ¶ 17, PageID.7; Plaintiff Norm Shinkle,[9] *id.*, ¶ 18, PageID.7; and Plaintiff Clint Tarver, *id.*, ¶ 21, PageID.8; Doc. 4-3, C. Tarver Dec., ¶ 5, PageID.153.

[9] Plaintiff Norm Shinkle also serves as a Republican member of the Michigan Board of State Canvassers. See Mich. Const 1963, Art 2, § 7. *See also,* Board of State

3. Officer or member of the governing body of a political party

Plaintiff Anthony Daunt has served as an officer and member of the governing body of the Clinton County Republican Party since 2017. (Doc. 1, Compl., ¶7, PageID.5; Doc. 4-3, Daunt Dec., ¶5, PageID.111). 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, PageID.5; Doc. 4-3, Berden Dec., ¶5, PageID.120.

Plaintiff Gerry Hildenbrand has been a member of a governing body of a national, state, or local political party since 2017. *Id.*, ¶ 12, PageID.6; Doc. 4-3, Hildenbrand Dec., ¶5, PageID.126.

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 and is therefore an officer or member of a governing body of a national, state, or local political party. *Id.*, ¶ 14, PageID.6; Doc. 4-3, L. Tarver Dec., ¶5, PageID.132.

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

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Canvassers, available at https://www.michigan.gov/sos/0,4670,7-127-1633_41221---,00.html.

Michigan Republican Party. *Id.*, ¶¶ 16, 19 PageID.6, 7-8; Doc. 4-3, M. Sheridan Dec., ¶ 5, PageID.138.

Plaintiff Mary Shinkle has served as the Vice Chair of the Ingham County Republican Party, a local political party, since November 2018. *Id.*, ¶ 17, PageID.7; Doc. 4-3, M. Shinkle Dec., ¶ 5, PageID.141. And Plaintiff Norm Shinkle has been an officer or member of a governing body of a state political party since February 2017. *Id.*, ¶ 18, PageID.7; Doc. 4-3, N. Shinkle Dec., ¶ 5, PageID.144.

4. Consultant or employee of an elected official, political candidate, campaign, or political action committee

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. (Doc. 1, Compl., ¶ 13, PageID.6; Doc. 4-3, Koutsoubos Dec., ¶ 5, PageID.129). 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, PageID.6; Doc. 4-3, Meyers Dec., ¶ 5, PageID.135. Plaintiff Mary Shinkle was an employee of Republican Congressman Mike Bishop between 2015 and 2018. *Id.*, ¶ 17, PageID.7; M. Shinkle Dec., ¶ 5, PageID.141.

5. Employee of the Legislature

Plaintiff Stephen Daunt has been an employee of the Michigan Legislature since January 1, 1991. (Doc. 1, Compl., ¶ 11, PageID.6; Doc. 4-3, S. Daunt, ¶5, PageID.123).

6. Registered lobbyist agent

Plaintiff Anthony Daunt has also served as a registered lobbyist agent in the State of Michigan since August 2013. (Doc. 1, Compl., ¶7, Pg ID #5; Daunt Dec., ¶ 5, PageID.111).

7. State employee exempt from classification

Plaintiff Koutsoubos was also an unclassified state employee between March 2014 and June 2017. (Doc. 1, Compl., ¶13, PageID.6; Doc. 4-3, Koutsoubos Dec., ¶5, PageID.129).

8. Immediate family members

Plaintiffs Norm and Mary Shinkle are husband and wife. (Doc. 1, Compl., ¶¶ 17-18, PageID.7; Doc. 4-3, N. Shinkle Dec., ¶ 5, PageID.144). Plaintiffs Linda Lee Tarver and Clint Tarver are husband and wife. *Id*., ¶¶14, 21, PageID.6, 8; Doc. 4-3, C. Tarver Dec., ¶ 5, PageID.153. Plaintiff Paul Sheridan is the son of Plaintiff Marian Sheridan. *Id*., ¶19, PageID.7-8; Doc. 4-3, P. Sheridan Dec., ¶5, PageID.147. Plaintiff Bridget Beard is the daughter of Plaintiff Marian Sheridan. *Id*., ¶20, PageID.8; Doc. 4-3, Beard Dec., ¶ 5, PageID.150.

ARGUMENT

I. Plaintiffs' motion for preliminary injunctive relief should be denied where a balancing of the equities weighs against enjoining Secretary Benson from implementing the new provisions of Michigan's Constitution mandating the establishment of an Independent Citizens Redistricting Commission.

A. Preliminary injunction factors.

Preliminary injunctive relief "is an extraordinary measure that has been characterized as 'one of the most drastic tools in the arsenal of judicial remedies.' "

Bonnell v. Lorenzo, 241 F.3d 800, 808 (6th Cir. 2001). It is well settled that a preliminary injunction will be granted only upon a clear showing of substantial likelihood of success on the merits at trial and irreparable injury if the defendant is not restrained. *Corning Glass Works v. Lady Cornella, Inc.*, 305 F. Supp. 1229 (E.D. Mich. 1969). A movant must meet an even higher standard for relief where—as here—the injunction will alter rather than maintain the status quo or where the injunction will provide the movant with substantially all the relief sought during the trial on the merits. *See generally Huron Valley Pub. Co. v. Booth Newspapers, Inc.*, 336 F. Supp. 659 (E.D. Mich. 1972); *Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 34 (2nd Cir. 1995); *Rathmann Group v. Tanenbaum*, 889 F.2d 787 (8th Cir. 1989).

Courts balance four factors in determining whether to grant a temporary or 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). In First Amendment cases, "the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits." *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007) (internal citations and quotations omitted). This is because the public's interest and any potential harm to the parties or others "largely depend on the constitutionality of the [state action]." *Id.* *See e.g. Ohio Republican Party v.*

Brunner, 543 F.3d 357, 361 (6th Cir. 2008); *NEOCH v. Blackwell,* 467 F.3d 999, 1009 (6th Cir. 2006); *Summit County Democratic Cent. & Exec Comm. v. Blackwell,* 388 F.3d 547, 550 (6th Cir. 2004).

B. Plaintiffs have not shown a strong likelihood of success on the merits of their First and Fourteenth Amendment claims.

Plaintiffs raise two claims in their complaint, one for violation of the First Amendment, the other for violation of equal protection under the Fourteenth Amendment. But neither claim is likely to succeed.

1. Plaintiffs are unlikely to succeed on their First Amendment claim.

Plaintiffs allege that 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." (Doc. 1, Compl., ¶ 59, PageID.26). Plaintiffs allege that these exclusions cannot be adequately linked to achieving the State's interest in establishing a fair and impartial redistricting process. *Id.*, ¶ 60, PageID.27.

Secretary Benson does not dispute that Plaintiffs possess fundamental rights to political speech and association; however, the interests of the State plainly outweigh any burden or infringement of those rights caused by the provisions in § 6. The interest of the State at issue here is fundamental.

Plaintiffs argue that the eligibility provisions deny them a valuable government benefit (compensation for service on the Commission) on a basis that infringes a constitutionally protected interest, specifically their First Amendment

rights. (Doc. 4, Plfs. Brf., PageID.71). Plaintiffs cite *Rutan v. Republican Party of Illinois* in support of their argument. 497 U.S. 62, 86 (1990). *Rutan* is one of a trio of U.S. Supreme Court cases addressing patronage in public employment, i.e., a government employer's conditioning or withholding of a benefit on the basis of a public employee's affiliation with or lack thereof with a particular political party. *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980) are the other two cases. These cases spring in part from the Court's decision in *Perry v. Sindermann*, which articulated (or re-articulated) what is often referred to as the "unconstitutional conditions" doctrine. 408 U.S. 593 (1972). *Perry* 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." 408 U.S. at 597.

The Sixth Circuit shed light on the application of this doctrine in *Planned Parenthood of Greater Ohio v. Hodges*:

> First a word or two about unconstitutional conditions. The United States Constitution does not contain an Unconstitutional Conditions Clause. 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. Governments generally may do what they wish with public funds, a principle that allows them to subsidize some organizations but not others and to condition receipt of public funds on compliance with certain obligations. What makes a condition unconstitutional turns not on a freestanding prohibition against restricting public funds but on a pre-existing obligation not to violate constitutional rights. 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.

917 F.3d 908, 911 (6th Cir., 2019) (citations omitted). The Sixth Circuit determined that the "enumerated right" at issue in that case was due process, and thereafter engaged in a Fourteenth Amendment due process analysis before concluding that there was no constitutional violation in that case. *Id.* at 911-912.

Here, the enumerated rights at issue are Plaintiffs' First Amendment political speech and associational rights. Although Commissioners are state officers and not elected officials,[10] the ineligibility criteria bear a resemblance to candidate eligibility statutes. Indeed, the amendment is an election regulation since the Commission will play a fundamental role in Michigan's electoral process by drawing the districts within which state and federal candidates will seek election to office. Federal courts generally review First Amendment challenges to such rules using the *Anderson/Burdick* balancing test.

The balancing test – from *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) – requires a court to "first consider the character and magnitude of the asserted injury to the rights protected by the [Constitution] that the plaintiff seeks to vindicate." *Green Party of Tenn. v. Hargett (Hargett II)*, 791 F.3d 684, 693 (6th Cir. 2015)(internal quotation marks and citations omitted). "Second, it must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* Last, "it must determine the legitimacy and strength of each of those interests and

[10] Contrary to Plaintiffs' suggestion, commissioners will not be state employees. See Mich. Const. 1963, Art. 11, § 5.

consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* "Though the touchstone of *Anderson-Burdick* is its flexibility in weighing competing interests, the 'rigorousness of [the court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.' " *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) (quoting *Burdick*, 504 U.S. at 434).

In conducting this review, the Court should be mindful that "[b]ecause redistricting is quintessentially a political process that the Constitution assigns to the States and Congress, federal courts' supervision is largely limited." *Shapiro v. McManus*, 203 F. Supp. 3d 579, 590-91 (D. Md. 2016) (citations omitted).

a. The State has a compelling interest in deciding who will be responsible for redistricting in Michigan.

The State's interest here is compelling. "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)). "[I]t is a characteristic of our federal system that States retain autonomy to establish their own governmental processes." *Arizona State Legislature v. Arizona Independent Redistricting Comm.*, 135 S. Ct. 2652, 2673 (2015) (citing *Alden v. Maine*, 527 U.S. 706, 752 (1999) ("A State is entitled to order the processes of its own governance.")) "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory*, 501 U.S. at 460.

In passing upon the prior redistricting commission, the Michigan Supreme Court observed that redistricting "goes to the heart of the political process" in a constitutional democracy:

> A constitutional democracy cannot exist [ ] without a legislature that represents the people, freely and popularly elected in accordance with a process upon which they have agreed.
>
> The issue here is power – political power – in a constitutional democracy. The Legislature has the ultimate authority to make the laws by which the people are governed. *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 (emphasis added). Although the Court ruled the commission no longer viable, it observed that the "power to redistrict and reapportion the Legislature remains with the people," which power could be exercised "by amending the constitution[.]" *Id*. at 139-140.

This is precisely what the people did in Proposal 2; taking the Legislature's de facto power to redistrict and placing it again within the power of a citizen Commission lodged in the legislative branch of government. *See, e.g*, *Arizona State Legislature*, 135 S. Ct. at 2673. In doing so, the people also provided for "the character of those who [will] exercise [the] government authority" of redistricting by prescribing eligibility requirements for the Commission. *Gregory*, 501 U.S. at 460.

This was necessary because political influence is endemic in the redistricting process. As noted in *League of Women Voters*, "[d]rawing district lines is an inherently political process." *Id*. at 881, citing *Gaffney v. Cummings*, 412 U.S. 735 (1973)("The reality is that districting inevitably has and is intended to have substantial political consequences.").

The eight ineligibility provisions in article 4, § 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. *See, e.g.,* 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 are modeled). Each of the individuals excluded has or can reasonably be perceived as having a private interest in the outcome of any redistricting plan approved by the Commission. The provisions are thus aimed at preventing the selection of a commissioner with a conflict of interest or who can be perceived as having a conflict of interest. *Id*. at 1808 ("Independent citizen commissions are the culmination of a reform effort focused heavily on limiting the conflict of interest implicit in legislative control over redistricting), 1817-1821 (discussing legislative conflict of interest and intent of independent citizen commissions to increase separation from conflict of interest).

The concern over conflict is why the Michigan Constitution itself 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). And as state officers all commissioners must act in the best interests of the public since an officer:

> [M]ay not use his or her official power to further his or her own interest and is not permitted to place herself or himself in a position that will subject him or her to conflicting duties—that is in a position where his or her private interest conflicts with his or her public duty—

> or cause him or her to act, or expose him or her to the temptation of acting, in any manner other than in the best interests of the public. . . . A conflict of interest arises when the public official has an interest not shared in common with the other members of the public[.]

63C Am. Jur. 2d, Public Officers and Employees, § 246. *See also People v Township Board of Overyssel*, 11 Mich 222, 225 (1863); 1863 WL 2386 ("All public officers . . . are trusted with public functions for the good of the public; to protect, advance and promote its interests, and not their own.").

The ineligibility provisions are intended to avoid this scenario by excluding individuals whose private interests, based on their participation in the political machinery of the State, will conflict with their public duty to draw district lines in an impartial manner, free from undue political influence. The intent can be viewed as analogous to ensuring selection of an impartial jury. Cain, 121 Yale L. J. at 1825 ("The implicit ideal was something analogous to an impartial jury, eliminating not only those with an insufficient degree of separation from elected officials, but also those whose involvement in politics might hinder their capacity to act impartially."). *See also* Mich. Ct. R. 2.511(D) (for cause jury challenges).

Each of the 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. As a result, they are not entitled to challenge other provisions not immediately applicable to them. *See, e.g.*, *Storer v. Brown*, 415 U.S. 724, 737 (1974) ("if a candidate is absolutely and validly barred from the ballot by one provision of the laws, he cannot challenge other provisions as applied to other candidates").

Plaintiff Barrett is presently a first-term Republican State Senator. (Doc. 4-3, Barrett Dec., ¶ 5, PageID.114). It could hardly be disputed that Senator Barrett will have a personal interest in how *his* senate district is redrawn in 2021, and in how the districts of his Republican colleagues, or his Democratic colleagues for that matter, will be redrawn.[11]

Several Plaintiffs are Republican precinct delegates: Linda Tarver, *id.*, ¶ 14, PageID.6; Mary Shinkle, *id.*, ¶ 17, PageID.7; Norm Shinkle, *id.*, ¶ 18, PageID.7; and Clint Tarver, *id.*, ¶ 21, PageID.8; Doc. 4-3, C. Tarver Dec., ¶ 5, PageID.153. Precinct delegates are elected at party primaries on a party basis at the precinct level. Mich. Comp. Laws, §§ 168.623a, 168.624. Precinct delegates vote at party conventions and assist their party by functioning as a conduit between local party members and the state parties by helping to recruit new members, elect party candidates, and ensure turnout at elections, among other duties.[12] As local party activists, precinct delegates certainly have an interest in how lines are drawn for the elected officials and candidates they support or will support in the future.

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[11] Plaintiff Barrett's exclusion from the Commission is not only consistent with, but may be required by Article 4, § 9, which prohibits sitting legislators from receiving "any civil appointment within this state," other than a notary public, while serving in office. Mich. Const. 1963, Art. 4, § 9. *See also* Mich. Const. 1963, Art. 4, § 8 ("No person holding any office . . . or position under . . . this state . . . may be a member of either house of the legislature").

[12] *See* Bridge Magazine, April 2018, https://www.bridgemi.com/michigan-government/fight-soul-michigan-gop-waged-precinct-precinct, (discussing significance of precinct delegates).

Similarly, several Plaintiffs are members or officers of the Republican Party at a local, state, or national level: Anthony Daunt, Doc. 4-3, A. Daunt Dec., ¶5, PageID.111); Kathy Berden, Doc. 4-3, Berden Dec., ¶5, PageID.120; Gerry Hildenbrand, Doc. 4-3, Hildenbrand Dec., ¶5, PageID.126; Linda Tarver, Doc. 4-3, L. Tarver Dec., ¶5, PageID.132; Marian Sheridan, Doc. 4-3, Sheridan Dec., ¶ 5, PageID.138; Mary Shinkle, Doc. 4-3, M. Shinkle Dec., ¶ 5, PageID.141; and Norm Shinkle, Doc. 4-3, N. Shinkle Dec., ¶ 5, PageID.144. As party leaders, these Plaintiffs are presumably responsible for growing the party at a local, state, or national level, and advancing the interests of the party, including supporting Republican candidates for office. Like elected precinct delegates, if not more so given their leadership status, these elected or appointed party officers have an interest in how lines are drawn for the elected officials and candidates they support or will support in the future.

Plaintiff Beauchine was an unsuccessful Republican candidate for a local office. (Doc. 4-3, Beauchine Dec., ¶ 5, PageID.117). Certainly, current candidates for a local, state, or federal office are properly excluded since they would have an interest in drawing district lines that would or could affect their own candidacies, or in drawing lines favorable or unfavorable to other candidates or legislators in an effort to advance their own interests. Even failed partisan candidates like Beauchine pose similar conflict concerns because he could have, or could be perceived as having, an interest in drawing lines that could benefit a future candidacy, his own or even another candidate's in the party.

Plaintiff Mary Shinkle worked as a paid employee for a former Republican Congressman, Doc 4-3, M. Shinkle Dec., ¶ 5, PageID.141, and Plaintiffs Koutsoubos and Meyers have worked as paid consultants to elected officials or candidates for partisan or nonpartisan office and/or for political action committees, Doc. 4-3, Koutsoubos Dec., ¶ 5, PageID.129; Doc. 4-3, Meyers Dec., ¶ 5, PageID.135.[13] Employees and consultants for partisan elected officials have a personal interest in lines being drawn that benefit their partisan employers. Even former employees and consultants may have a residual interest in the employer's district with respect to maintaining connections or forging future connections in the district. And regardless, former employees and consultants raise conflict of interest concerns simply because of their status as former employees and consultants of partisan officials.

Work for nonpartisan elected officials and candidates raises conflict issues as well. Again, the purpose of the ineligibility provisions is to separate the Commission and its members from *political* influence, not simply *partisan* influence. Nonpartisan officials and candidates can be as entrenched in the political machinery of government as much as any partisan, and thus have personal interests in who is elected in a particular district and therefore how it is drawn. As a result, working or consulting for these individuals raises the same concerns as it does with respect to the partisan officials discussed above.

[13] These Plaintiffs declined to identify which officials, candidates, or political action committees they were paid to consult with.

Plaintiff Stephen Daunt has been an employee of the Michigan Legislature since 1991. (Doc. 4-3, S. Daunt, ¶5, PageID.123). Upon information and belief, Plaintiff Daunt presently works for the Michigan House Republican policy office. Certainly, as a current legislative employee who works in a partisan capacity, he has an interest in how his party's legislative districts are redrawn.

Plaintiff Koutsoubos was an unclassified state employee. (Doc. 4-3, Koutsoubos Dec., ¶5, PageID.129). Under Michigan's Constitution, the head of a principal department may employ up to five individuals in "policy-making" positions that are exempt from civil service. Mich. Const. 1963, Art. 11, § 5. Plaintiff Koutsoubos was appointed by former Republican Secretary of State Ruth Johnson as an executive office representative and later appointed to the unclassified position of Director of the Office of External Affairs.[14] Plaintiff Koutsoubos's participation in state government as a policymaker for an elected state official raises the same conflict of interest concerns discussed above.

Plaintiff Anthony Daunt is a registered lobbyist, (Daunt Dec., ¶ 5, PageID.111), for the Michigan Freedom Fund.[15] According to its website, the Michigan Freedom Fund is a nonprofit organization that creates educational initiatives, promotes issue advocacy, and supports policies that protect citizens'

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[14] The press release is available at https://www.michigan.gov/sos/0,4670,7-127--298666--s,00.html.

[15] Plaintiff Daunt's lobby registration information is available on the Secretary of State's website at https://miboecfr.nictusa.com/cgi-bin/cfr/lobby_detail.cgi?caller%3DSRCHRES%26last_match%3D50%26lobby_type%3D%2A%26lobby_name%3DDAUNT%26include%3Dactive%261%3D1%26lobby_id%3D12493%26last_match%3D0.

constitutional rights.[16] As the Fund's lobbyist, Plaintiff Daunt seeks to influence the legislative or administrative actions of public officials, including legislators, in order to advance or promote the interests of the Fund. *See* Mich. Comp. Laws, §§ 4.412(1), 4.415(1)-(3). Lobbyists like Plaintiff Daunt are active participants in the political process and their personal and financial success depends on forging relationships and currying favor with state and federal legislators on behalf of their special-interest clients. This means Plaintiff Daunt has an interest in who is elected to the Legislature and Congress, which of course, is impacted by how district lines are drawn. This private interest conflicts with the public duty of a Commissioner to draw fair and impartial lines.

Last, several Plaintiffs are family members. Norm and Mary Shinkle are husband and wife, Doc. 4-3, N. Shinkle Dec., ¶ 5, PageID.144, as are Linda Lee Tarver and Clint Tarver, Doc. 4-3, C. Tarver Dec., ¶ 5, PageID.153. But, as discussed above, these four individuals are currently ineligible due to their own conflicts of interest; not because of their status as spouses of ineligible Plaintiffs. The family member exclusion is thus not the cause of any present injury to these Plaintiffs.

Paul Sheridan and Bridget Beard are the children of Plaintiff Marian Sheridan. (Doc. 4-3, P. Sheridan Dec., ¶5, PageID.147; Doc. 4-3, Beard Dec., ¶ 5, PageID.150). Marian Sheridan is the Grassroots Vice Chair of the Michigan

[16] See Michigan Freedom Fund, Our Mission tab, available at https://www.michiganfreedomfund.com/our-mission.

Republican Party. (Doc. 4-3, M. Sheridan Dec., ¶ 5, PageID138).[17] As discussed above, Ms. Sheridan's status as a party leader presents a conflict because her private interests in the success of the party conflicts with the public duty of a commissioner to draw lines without consideration of who or which party will benefit from the lines drawn. Her Plaintiff children are conflicted because of their status as immediate family members. It is not unreasonable to think that Paul and Bridget, if chosen as commissioners, would be inclined to perform their public duties in a way beneficial to the interests of their mother. Even if that were not true, their presence on the Commission would raise the appearance of a conflict of interest.

b. The burden on Plaintiffs' speech and association rights is minimal.

Any burden on Plaintiffs' political speech and association rights resulting from the ineligibility provisions is minimal at best. Plaintiffs do not have a right to be a member of this Commission any more than they do any other commission or board created by the Michigan Constitution. *See, e.g.*, *Snowden v. Hughes,* 321 U.S. 1, 6–7 (1944) (no fundamental right to public employment); *Bullock v. Carter,* 405 U.S. 134, 142–43 (1972) (no "fundamental right to run for elective office"). Notably, the Constitution already limits political affiliation on certain of these entities by limiting the number of appointments of persons associated with a political party. *See* Mich. Const 1963, Art. 2, § 7 (Board of State Canvassers); Art. 5, § 28 (State

[17] According to the Michigan Republican Party website, Ms. Sheridan organizes grassroots events in order to spread the Republican message, grow the party, and recruit precinct delegates. See Michigan Republicans, Party Leadership tab, available at https://www.migop.org/about.

Transportation Commission); Art. 5, § 29 (Civil Rights Commission); Art. 11, § 5 (Civil Service Commission).

Article 4, § 6 expressly requires that eight of the thirteen Commissioners be affiliated with a major political party—four members each of the Republican Party and the Democratic Party. Plaintiffs, as Republicans, are eligible based on their party affiliation to apply for the four Republican seats. But they cannot do so for this redistricting cycle. Not because of their political affiliation, but because they have, or can reasonably be perceived as having, a conflict of interest given their past or present status, *e.g.*, partisan elected official or candidate, political party officer, lobbyist, legislative employee, spouse, *etc.* Plaintiffs, however, could be eligible for the next redistricting cycle. Indeed, they have approximately four years (given the six-year look back) in which to act to ensure their eligibility to apply for the next Commission.

For some plaintiffs, this may mean declining to run for an office, or resigning from an office or employment so that the plaintiff is eligible to apply for the Commission. But these are the kinds of decisions people often make in deciding to run for an office or seek an appointment to an office. There is a burden in making such decisions, but it certainly is not severe. *See, e.g., Clements v. Flashing*, 457 U.S. 957 (1982) (upholding provision rendering ineligible certain persons from election or appointment to state legislature); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 835 n. 48 (1995) (noting validity of resign-to-run statutes); *Grizzle v. Kemp*, 634 F.3d 1314 (11th Cir. 2011) (reviewing constitutionality of state statute

disqualifying individuals from serving on local boards); *Worthy v. State of Michigan, et al.*, 142 F. Supp. 2d 806 (E.D. Mich. 2000) (Michigan provision barring sitting judges from seeking non-judicial election office for a period of time constitutional).

c. On balance the State's compelling interest outweighs the minimal burden on Plaintiffs' speech and associational rights.

If a state imposes "severe restrictions" on a plaintiff's constitutional right, its regulations survive only if "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. But "minimally burdensome and nondiscriminatory" regulations are subject to a "less-searching examination closer to rational basis" and "'the State's important regulatory interests are generally sufficient to justify the restrictions.'" *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016) (citing *Green Party of Tenn. v. Hargett (Hargett I)*, 767 F.3d 533, 546 (6th Cir. 2014), and quoting *Burdick*, 504 U.S. at 434). Regulations falling somewhere in between—"i.e., regulations that impose a more-than-minimal but less-than-severe burden—require a 'flexible' analysis, 'weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it.' " *Ohio Democratic Party*, 834 F.3d at 627 (quoting *Hargett I*, 767 F.3d at 546).

As discussed above, the State has a compelling interest in prescribing qualifications for who may serve on the Commission—the quasi-legislative body now charged with performing the fundamental task of redistricting in Michigan. The composition and selection of Commission members was designed to remove, or significantly reduce, the political influence endemic in the drawing of lines.

Commissioners are randomly selected through a complex process, rather than appointed, and individuals, like Plaintiffs, with identifiable conflicts of interest are ineligible to apply to the Commission. The ineligibility provisions do not discriminate based on political speech or association, or on any other fundamental right. And the burden on Plaintiffs is minimal. Plaintiffs remain free to speak and associate as Republicans, they just cannot do so as members of the Commission for this redistricting cycle. Again, this is not because of their past or present political association but because their private interest conflict with the public duties of commissioners to draw fair and impartial lines, as free from political influence as possible. Moreover, Plaintiffs' burdens are temporary. Plaintiffs are free to plan and act accordingly to render themselves eligible to apply to the Commission for the 2030 redistricting cycle.

In affirming the constitutionality of Arizona's Independent Redistricting Commission, the U.S. Supreme Court observed it "has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.' " *Arizona State Legislature*, 135 S. Ct. at 2673 (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)). And in *Rucho*, the Supreme Court noted with approval that states, including Michigan, are acting to restrict "partisan considerations in districting" by "placing [the] power to draw electoral districts in the hands of independent commissions." 139 S. Ct. at 2507 (citations omitted).

Here, Michigan has devised its solution to unconstitutional partisan gerrymandering in the redistricting process. The State's compelling interest in

having district lines drawn by commissioners independent of political influence plainly outweighs the minimal, or at most, moderate burden imposed on Plaintiffs by the ineligibility provisions. The provisions are tailored to the individuals who present the most concern for conflicts based on their participation in the political process. And these exclusions plainly further the State's interest in entrusting redistricting to commissioners who are not encumbered by political considerations. The ineligibility provisions do not violate Plaintiffs' First Amendment rights.

2. Plaintiffs are unlikely to succeed on their Equal Protection Clause claim.

Plaintiffs allege that the amendments establishing the Commission exclude certain categories of individuals from eligibility for service on the Commission, "on account of their exercise of fundamental rights that are expressly protected by the First Amendment." (Doc.1, Cmplt, ¶67, PageID.29; Doc. 4, Mot. for Prelim. Inj., PageID.79). However, for the reasons stated above, the amendment's ineligibility provisions do not severely infringe Plaintiffs' First Amendment freedoms.

The level of scrutiny applied to an Equal Protection Clause challenge depends on whether the group disadvantaged by the state action is a suspect class or whether the restriction burdens that group from exercising a fundamental right. If the group is a suspect class or the restriction burdens a fundamental right, the courts apply strict scrutiny, but otherwise the courts will generally apply the rational basis test. See, e.g., *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012) ("This 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.'") (quoting *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)).

Here, the group affected by the amendment does not consist of any suspect classification, such as race or religion. Rather, Plaintiffs consist of partisan elected officials and/or candidates, party officials, lobbyists, paid political consultants, and certain close relatives of the same.[18] (Doc.1, ¶7-21, p 5-8, PageID.5-8). And, as discussed earlier, there is no severe burden on their First Amendment rights, and the amendment affects only their ability to serve on the Commission that convenes around every decennial census. Because the amendment does not target a suspect class, and because there is no severe burden on a fundamental right, the appropriate standard is rational basis review. The U.S. Supreme Court has held that rational basis review is satisfied, "so long as there is a plausible policy reason" for the decision. *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992).

There is more than a sufficient rational relationship between the disparate treatment of Plaintiffs and the government's interests. 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. Its passage was a reflection of popular frustration at the manipulation of those districts

[18] In *Chupa v. Moceri*, 2007 U.S. Dist. LEXIS 26013 (E.D. Mich, 2007) at *25-26, the Court observed, "There is, certainly, no Children-of-Elected-Officials class…for purposes of federal equal protection analysis."

by the legislators who would then campaign to fill them. Partisan elected officials, candidates, lobbyists, consultants, and party officials constitute the political apparatus that created the circumstances that gave rise to the amendment in the first place. Allowing them to now become members of the Commission would contradict the purpose of the amendment, turning it into a kind of constitutional shell game. The government has a legitimate interest in protecting the legitimacy of the people's chosen redistricting system. This is a clearly rational reason to exclude these categories of person from the Commission.

Similarly, there is a rational basis to exclude certain close family relations of that political class of persons. The amendment prohibits parents, stepparents, children, stepchildren, and spouses of persons who are disqualified under any of the other categories of excluded persons. Mich. Const. 1963, Art. 4, §6(1)(c). These relations can be presumed to have a financial or other interest in the outcome of the redistricting on behalf of their parents, children, or spouses. This is similar to many other kinds of anti-nepotism statutes and restrictions. For example, Mich. Comp. Laws § 432.31 provides that a lottery ticket "shall not be purchased by and a prize shall not be paid to an officer or employee of the bureau or to any spouse, child, brother, sister or parent residing as a member of the same household in the principal place of abode of an officer or employee." Another apt comparison may be drawn to Mich. Ct. R. 2.511(D)(8), which provides that any potential juror related within "the ninth degree of consanguinity or affinity to one of the parties or attorneys" is removable for cause. These restrictions are even more broad than

what is required by the amendment, but the reason for them is obvious. It is likewise obvious that the narrow list of relatives in the amendment are likely to have too close of an interest in the outcome of redistricting to be considered independent, and they could be at least suspected of using their vote on the Commission to the advantage of their family.

Such anti-nepotism restrictions have been repeatedly upheld against Equal Protection challenges. The Sixth Circuit has observed that, "virtually every court to confront a challenge to an anti-nepotism policy on First Amendment, substantive due process, equal protection, or other grounds has applied rational basis scrutiny." *Montgomery v. Carr,* 101 F.3d 1117, 1126 (6th Cir. 1996). And the Michigan Supreme Court has previously noted that the validity of anti-nepotism and no-spouse policies, "has been consistently sustained when challenged under Title VII of the Civil Rights Act of 1964." *Miller v. C.A. Muer Corp,* 362 N.W.2d 650, 653 (Mich. 1984)(citing *Harper v. Trans World Air Lines*, 525 F2d 409 (8th Cir, 1975); *Yuhas v Libbey-Owens-Ford Co*, 562 F2d 496 (7th Cir., 1977), cert den 435 U.S. 934 (1978); *Meier v Evansville-Vanderburgh School Corp*, 416 F Supp 748 (S.D. Ind., 1975), aff'd 539 F2d 713 (7th Cir., 1976); *Tuck v McGraw-Hill, Inc*, 421 F Supp 39 (S.D. N.Y., 1976)). It would be very curious if anti-nepotism restrictions that are virtually identical to those that have previously been upheld under Title VII were held to violate Equal Protection in this case.

Plaintiffs claim that the amendment burdens their fundamental rights, and so strict scrutiny should apply. For the reasons stated earlier, there is no severe

burden on any fundamental right under the First Amendment, and the minimal burden imposed by the ineligibility provisions is outweighed by the State's compelling interest in determining who will perform redistricting. Thus, even if strict scrutiny were to apply, the amendment would still survive review. According to Plaintiffs, the amendment must be "narrowly tailored to legitimate government objectives." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972). Here, the objectives of the amendment are to create a decision-making body that is independent of the partisan political structure of the state's political parties and special interests. The purpose of the Commission created by the amendment is to reform the drawing of legislative districts and to create districts that are less tailored to partisan objectives—in other words, to combat the practice of unconstitutional partisan gerrymandering. These objectives go to the very heart of representational government and the ability of the people govern themselves. It is difficult to conceive of a more legitimate governmental purpose than its efforts to improve the integrity of its institutions and the fairness of its elections.

So, the question becomes whether the amendment is narrowly drawn to achieve that aim. Plaintiffs argue that these objectives are too attenuated from their "prior exercise of their First Amendment rights." (Doc. 4, p 25, PageID.77). Again, their exclusion is not based upon their chosen party affiliation; it is instead premised upon their real or apparent conflicts of interest as to the outcome of the decisions the Commission will be required to make. Plaintiffs too readily conflate partisan viewpoints—even extreme viewpoints—with being a political office holder

or candidate. Perhaps that viewpoint reflects the hyper-partisanship that gerrymandering districts tends to encourage, and what the voters overwhelming voted to confront through this amendment.

Nonetheless, however else impartiality may be encouraged by the amendment, Plaintiffs acknowledge that the Commission itself was not designed to be impartial to party identity, and specifically incorporates persons with party affiliations. (Doc. 4, p 26, PageID.78). Plaintiffs' mistake is thinking that this means that there is no reason to exclude them for their political activities. Plaintiffs have simply missed the point. Their exclusion has nothing to do with their party affiliation or their attempts to petition their government—it has to do with their professional or financial reliance upon outcome of the Commission's decisions.

The Commission is, essentially, a kind of jury of ordinary citizens pulled from the community to decide how the state's legislative districts will be drawn. Indeed, the amendment actually provides for the heads of the state senate and state house to "strike" applicants from the pool, just like jurors. Mich. Const. 1963, Art. 4, §6(2)(e). Plaintiffs—as elected officials, candidates, party officials, lobbyists, and consultants—are not just ordinary citizens; they are basically parties to the action, with at least a potential personal interest in the outcome. Put another way, if there were a lawsuit involving the drawing of districts, these Plaintiffs would almost certainly be excused for cause. *See e.g.* Mich. Ct. R. 2.511(D)(3), (8), (11), and (12).

The amendment is narrowly drawn because it limits its categorical exclusions to only those with a potential conflict of interest based upon their being a partisan office holder, candidate, party official, lobbyist, or paid political consultant, or those who are children, step-children, parents, step-parents, or spouses to someone who falls in one of those categories. It does not apply to an overly broad group of relatives, only those who are very close or even in the same household. And it does not bar them from all governmental office-holding, only from this one Commission that exists only for a short period of time every ten years. The amendment also does not bar campaign volunteers, and instead excludes only those who are paid consultants or office holders, candidates, parties, political action committees, the legislature, or who are policy-level unclassified state employees. And even those who fall within one of the exclusion categories are excluded only if they have held a disqualifying position within the previous 6 years. The amendment excludes only as many people as necessary to prevent those with a conflict of interest from being on the Commission, and so it is narrowly drawn to further its legitimate objectives.

3. Plaintiffs are unlikely to succeed on either claim because the doctrine of laches applies.

Plaintiffs have known for months about the passage of this amendment to Michigan's constitution, and the exclusions that form the basis of their claims were explicitly written into the language of the amendment. *See* Mich. Const. 1963, Art. 4, §6(1). The amendment was passed by the voters on November 6, 2018 and was effective December 22, 2018. News reports about the adoption of the amendment

were widespread.[19] Yet, Plaintiffs took no action until the filing of this lawsuit on July 30, 2019—over eight months later.

The defense of laches is rooted in the principle that "equity aids the vigilant, not those who slumber on their rights." *Lucking v. Schram*, 117 F.2d 160 (6th Cir. 1941). An action may be barred by the equitable defense of laches if: (1) the plaintiff delayed unreasonably in asserting her rights and (2) the defendant is prejudiced by this delay. *Brown-Graves Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 206 F.3d 680, 684 (6th Cir. 2000). Laches applies in this case for both reasons.

First, despite having reason to be very well-informed of the debate surrounding the amendment and its subsequent passage by an overwhelming majority of voters, Plaintiffs unreasonably delayed raising their claims before this Court. The U.S. Supreme Court has repeatedly cautioned courts regarding last-minute injunctive relief in such cases. *See, e.g., William v. Rhodes*, 393 U.S. 23, 34-35 (1968) (affirming denial of request for injunction requiring last-minute changes to ballots, given risk of disrupting election process).

Indeed, the Sixth Circuit has reasoned that as time passes, the interests in proceeding with election matters increase in importance "as resources are

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[19] *See e.g.* Paul Egan, *Michigan Voters Approve Anti-Gerrymandering Proposal 2,* Det. Free Press, Nov. 6, 2018, at shorturl.at/esHSY, last accessed Aug. 20, 2019, and the passage of the amendment was even the subject of national news, *see e.g.* Katie Zezima and Emily Wax-Thibodeaux, *Voters Are Stripping Partisan Redistricting Power From Politicians In Anti-Gerrymandering Efforts,* The Washington Post, Nov. 7, 2018, at www.shorturl.at/vxAF6, last accessed Aug. 20, 2019.

committed and irrevocable decisions are made, and the candidate's claim to be a serious candidate who has received a serious injury becomes less credible by his having slept on his rights." *Kay v. Austin*, 621 F.2d 809, 813 (1980); *see also Nader v. Blackwell*, 230 F.3d 833, 835 (6th Cir. 2000); *McNeilly v. Terri Lynn Land*, No. 1:10-cv-612 (W.D. Mich. July 22, 2010), *aff'd* 684 F.3d 611 (6th Cir. 2012); *Libertarian Party of Michigan v. Johnson*, 905 F. Supp. 2d 751, 754 n.2 (E.D. Mich. 2012). While this case does not concern an election directly, there are the same type of time constraints and government interests involved here as there are in more traditional election cases.

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. Plaintiffs have unreasonably and unnecessarily delayed in bringing this constitutional challenge, despite full knowledge of the passage of the amendment, the urgent time constraints it placed on Secretary Benson, and the need for applications to mailed within weeks of filing their challenge. Plaintiffs have "slept on their rights" and did not timely file this challenge. Whereas the plaintiff in *Kay* waited only eleven days after his injury accrued to sue, *Id.* at 810, Plaintiffs have delayed for nearly a year.

Moreover, there appears to be no legitimate explanation for the delay—there have been no sudden factual or legal developments that have had any effect on the claims they seek to raise here. As in *Kay,* Plaintiffs' claim to have received a

serious injury is less credible because they have slept on their rights. 621 F.2d at 813. Nowhere in either Plaintiffs' Complaint or their Motion for Preliminary Injunction do Plaintiffs explain why they were unable to file their claims sooner, or what caused them to delay for so long. Rather, it is apparent that the filing of this lawsuit was timed to have the best chance to interfere with the Secretary's ability to comply with the deadlines imposed by the amendment.

Second, Plaintiffs' delay prejudices Secretary Benson in this case, as her "interest in proceeding with the election increases in importance" as the deadline for mailing applications looms. *See* Exhibit A, Affidavit of Sally Marsh, ¶ 22. The issuance of even a temporary injunction could effectively be fatal to the Secretary's ability to meet the deadlines required by the amendment.

Plaintiffs unreasonably delayed for months in raising these claims before this Court, and the consequences of their delay have prejudiced Defendant. So, this Court should refuse to entertain their claims now based on the doctrine of laches.

4. Even if any of the ineligibility provisions are found unconstitutional, they may be severed from the rest of the amendment.

"Severability is of course a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). Plaintiffs argue that if any provision is found unconstitutional, the entire amendment must be struck because the provisions are not severable. But Plaintiffs' argument against severability rests on an analysis of *statutory* interpretation and the supposed inability to divine what the voters intended about severability. (Doc. 4, p 29-33, Page ID.81-85). This argument, however, misses the amendment's express inclusion of a severability clause, which provides:

> 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. 1963, Art. 4, § 6(20). There is, accordingly, no need to engage in any speculation about the voters' intent. Michigan's Supreme Court has held that it interprets the State's constitution according to "the text's original meaning to the ratifiers, the people, at the time of ratification," and that the primary rule is that of "common understanding." *Citizens Protecting Michigan's Constitution v. Secretary of State,* 921 N.W.2d 247, 253 (Mich. 2018). Here, the plain language of the amendment expressly provides that severability is intended and authorized.

It is interesting that Plaintiffs'—in arguing that severability is not possible—appear to suggest that the exclusions of persons from the Commission are "so essential" as to cast doubt on the operation of the amendment as a whole. (Doc. 4, p 30, PageID.82). While Plaintiffs' argument against severability cannot be sustained in the face of the express authorization for severability in the amendment, it should not escape attention that Plaintiffs' suggestion that the exclusions are "essential" necessarily undermines their constitutional arguments that the exclusions are not narrowly drawn.

C. Plaintiffs have not demonstrated irreparable injury.

Plaintiffs have not demonstrated any irreparable injury. First, 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. Their temporary ineligibility to apply to the Commission is not based on their party affiliation, but upon the conflict inherent between their private interests and the public duty of the Commission to draw lines in a fair and impartial manner. For the same reasons stated in the discussion of the merits, Plaintiffs' First and Fourteenth Amendment rights are not violated by the amendment, and therefore Plaintiffs suffer no irreparable harm on the basis of any alleged constitutional deprivation.

Second, to whatever extent Plaintiffs raise a claim based on "exclusion from state employment," that is not an "irreparable" injury. The Supreme Court has held:

> The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1974). Here, there would be an adequate remedy for any supposed loss of opportunity, because Plaintiffs could—if they prevailed—receive monetary compensation for the pay they might have received as Commission members.

Also, to the extent Plaintiffs allege that they may be unconstitutionally excluded from service on the Commission, applications are not due until June of 2020, and there is time enough to fully litigate the issues before that date. Plaintiffs have no imminent risk of harm and a preliminary injunction is

premature and unnecessary. Plaintiffs have not demonstrated an irreparable injury.

But even if one or more of the Plaintiffs could demonstrate irreparable harm in the sense that Plaintiffs are ineligible to be members of the Commission, as set forth above Plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claims. As the Sixth Circuit has held, "a finding that there is simply no likelihood of success on the merits is usually fatal" to a request for injunctive relief. *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000).

D. An injunction will cause irreparable harm to the State.

An injunction will irreparably harm the State and its citizens. The constitutional amendment challenged here was duly enacted by the Michigan voters in an expression of their will as to who they wanted to exercise the power of drawing their electoral districts. As discussed in the attached Affidavit of Sally Marsh, 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 the ability to complete the random selection process for members of the Commission in time for them to complete their duties. (Ex. A, ¶ 22).

E. An injunction is not in the public interest.

Granting injunctive relief is not in the interest of the people of Michigan. The U.S. Supreme Court has recognized that "anytime a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form

of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, *3 (2012) (C.J. Roberts in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977)). Surely this is true, if not more so, when it is an initiated state constitutional provision in dispute.

The people have a strong interest in having their Constitution effectuated. The consequences of injunctive relief in this case would extend far beyond the facts of this case. Further, the pool of applicants must be available by July 1, 2020 in order for the selection process to proceed. Mich. Const. 1963, Art. 4, § 6(d). Any injunction that prevents that from happening would effectively make it impossible for the redistricting Commission to be seated, and it will be ten years before another decennial census and the accompanying redistricting. It is not in the public's interest to have their preferred method of choosing electoral districts thwarted for over a decade.

In sum, Plaintiffs have not met the factors that justify the extraordinary relief they seek, which is to enjoin the Secretary of State from implementing the redistricting Commission required by article 4, § 6 of Michigan's Constitution.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Plaintiffs have failed to demonstrate that they are likely to succeed on the merits of their claims, that they have or are likely to suffer any irreparable injury, that Defendant will not be harmed by an injunction, or that an injunction is in the public's interest.

Defendant Secretary of State Jocelyn Benson therefore respectfully requests that this Honorable Court enter an order denying Plaintiffs' motion for preliminary

injunction, together with any other relief that the Court determines to be appropriate under the circumstances.

Respectfully submitted,

DANA NESSEL
Attorney General

s/Heather S. Meingast
Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: meingasth@michigan.gov
(P55439)

Dated: September 19, 2019

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2019, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing of the foregoing document as well as via US Mail to all non-ECF participants.

s/Heather S. Meingast
Heather S. Meingast (P55439)
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: meingasth@michigan.gov
P55439