UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY DAUNT, et al.,

Plaintiffs,

v.

JOCELYN BENSON, et al.,

Defendants.

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

MICHIGAN REPUBLICAN PARTY, et al.,

Plaintiffs,

v.

JOCELYN BENSON, et al.,

Defendants.

Case No.: 1:19-cv-00669 (Member)

HON. JANET T. NEFF

PLAINTIFFS' CONSOLIDATED RESPONSE TO DEFENDANTS' RESPECTIVE MOTIONS TO DISMISS AND PLAINTIFFS' CONSOLIDATED REPLY TO DEFENDANTS' RESPECTIVE RESPONSES TO MOTION FOR PRELIMINARY INJUNCTION[1]

[1] The overriding issue in a Motion for Preliminary Injunction, and on which both Defendants focused their Responses to Plaintiffs' Motion for Preliminary Injunction, is the likelihood of success on the merits of the claimed constitutional violations. Thus, the instant discussion of the merits of Plaintiffs' claims is equally applicable to the Objections to the Motion for Preliminary Injunction, and Plaintiffs, therefore, will not burden the Court with a repetition of that discussion in a separate Reply to Defendants' Responses to the Motion for Preliminary Injunction.

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INTRODUCTION

Defendants grossly mischaracterize the nature of the Commission and its members, contending they are divorced from partisanship, while ignoring that the predominant factor in determining eligibility and selecting Commissioners is political activity or partisan affiliation. Michigan Proposal 18-2 (the "Amendment") amended Michigan's Constitution to establish an independent citizens redistricting commission (the "Commission") for state legislative and congressional districts, Mich. Const. art. 4, § 6. Unfortunately, the Amendment unconstitutionally infringes on freedom of association, overtly discriminates against applicants because of their partisan affiliation, expression, or viewpoint, and unlawfully restricts the speech of Commissioners and Commission employees.

Plaintiffs do not contend that they have a "fundamental right" to public office or employment on the Commission. However, Plaintiffs do have a right to seek service as a Commissioner free from government regulations that impose a severe burden on, or substantially interfere with, their fundamental rights of association, speech, and equal protection. Although Plaintiffs do not necessarily oppose the general concept of a redistricting commission, they vehemently oppose this Commission because it is structured in a manner that violates their civil rights.

Because Plaintiffs have sufficiently stated constitutional claims arising from the Amendment's implementation, Plaintiffs are likely to prevail on the merits of their claims and this Court should deny Defendants' respective motions to dismiss and grant Plaintiffs' motion for preliminary injunction.

STATEMENT OF FACTS

Plaintiffs filed this lawsuit to challenge the Amendment's constitutionality under the First and Fourteenth Amendments to the United States Constitution and under federal law, 42 U.S.C. §

1983. In particular, the eligibility criteria and Commissioner selection process violate Plaintiffs' freedoms of speech and association and their right to equal protection of the laws.

Plaintiff Michigan Republican Party ("MRP") is a major political party under State law. (Member Case, ECF No. 1, Complaint, PageID.5.) Each of the individual Plaintiffs, Laura Cox, Terri Lynn Land, Savina Alexandra Zoe Mucci, Dorian Thompson, and Hank Vaupel, affiliates with MRP and wishes to apply to serve as a Commissioner, but is ineligible under the Amendment, a fact not in dispute. (*See* Lead Case, ECF No. 36, Def. VNP's Br. Opposing Members' Mot. for Prelim. Injunc. ("Def. VNP's Resp."), PageID.446.) Defendant Jocelyn Benson is the public official responsible for implementing the Amendment. Voters Not Politicians ("VNP") was the Amendment's sponsor and intervened as a Defendant in this matter.

Rather than burdening the Court with further recitation of the material facts, Plaintiffs incorporate by reference the factual background from the Brief in Support of Plaintiffs' Motion for Preliminary Injunction. (Member Case, ECF No. 3, Br. in Support of Pls.' Mot. for a Prelim. Injunc.) The parties agree that this matter presents only legal issues for the Court. (Lead Case, ECF No. 36, Def. VNP's Resp., PageID.448.)

ARGUMENT

I. LEGAL STANDARDS

Defendant VNP is seeking dismissal of the Complaint based on Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(c), and Defendant Benson is seeking dismissal based on Fed. R. Civ. P. 12(b)(6). Neither Defendant can satisfy the standards for such motions.

Rule 12(b)(1). Under Rule 12(b)(1), the Court may dismiss an action for lack of subject matter jurisdiction. "A Rule 12(b)(1) motion for lack of subject matter jurisdiction can challenge the sufficiency of the pleading itself (facial attack) or the factual existence of subject matter jurisdiction (factual attack)." *Cartwright v. Garner*, 751 F.3d 752, 759 (6th Cir. 2014). A facial

attack—like the one Defendant VNP mounts here—challenges "the sufficiency of the pleading." *Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 387 (6th Cir. 2016) (quoting *O'Bryan v. Holy See*, 556 F.3d 361, 375 (6th Cir. 2009)). In resolving a facial attack, all factual allegations "must be accepted as true." *VIBO Corp. v. Conway*, 669 F.3d 675, 683 (6th Cir. 2012).

Rule 12(b)(6). Under Rule 12(b)(6), the Court may dismiss an action for "failure to state a claim upon which relief can be granted." Here, too, the Court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Wilburn v. United States*, 616 F. App'x 848, 852 (6th Cir. 2015) (quoting *DirecTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). Under Fed. R. Civ. P. 8(a)(2), a plaintiff need only provide a "a short and plain statement of the claim showing that the pleader is entitled to relief" to "give the defendants fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal edits, quotation marks, and citation omitted). This standard of "notice pleading," *Estate of Smith v. United States*, 509 F. App'x 436, 439 (6th Cir. 2012), does not require "detailed factual allegations," *Twombly*, 550 U.S. at 555. Nor does it require probability, but only "facial plausibility"—i.e., "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

Rule 12(c). Rule 12(c) states that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." "The pleadings are closed after the filing of the complaints, answers, and any replies ordered by the court." *Forest Creek Townhomes, LLC v. Carroll Prop. Mgmt., LLC*, 695 F. App'x 908, 913 (6th Cir. 2017) (citing 5C Wright & Miller, *Fed. Prac. & Proc.* § 1367). "The standard of review for a Rule 12(c) motion is the same as for a motion under Rule 12(b)(6) . . . ." *Tinney v. Richland Cty.*, 678 F. App'x 362,

364 (6th Cir. 2017) (quoting *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) (internal citation omitted)).

Accepting all allegations as true and construing the complaint in the light most favorable to Plaintiffs, there can be no real doubt that Plaintiffs have sufficiently stated claims upon which relief can be granted, and Plaintiffs have established standing to bring their claims. Therefore, the Court should deny Defendants' respective motions to dismiss.

II. PLAINTIFFS HAVE SUFFICIENTLY STATED FIRST AMENDMENT CLAIMS UPON WHICH RELIEF CAN BE GRANTED AND ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR CLAIMS

Where a plaintiff makes a facial challenge to the constitutionality of a State regulation under the First Amendment, the facial challenge is an overbreadth challenge. *O'Toole v. O'Connor*, 802 F.3d 783, 789 (6th Cir. 2015) (citing *Speet v. Schuette*, 726 F.3d 867 (6th Cir. 2013)). "To prevail, a plaintiff must show substantial overbreadth: that the statute prohibits a substantial amount of protected speech both in an absolute sense and relative to [the statute's] plainly legitimate sweep[.]" *Id.* (citing *Speet*, 726 F.3d at 872) (internal quotation marks omitted).

Defendant VNP argues that, to prevail on their facial challenge, Plaintiffs must establish that "no set of circumstances exists" under which the Amendment would be valid. (Lead Case, ECF No. 36, Def. VNP's Resp., PageID.455.) Defendant is mistaken. As described above, the Supreme Court "recognize[s] a second type of facial challenge in the First Amendment context under which a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (citing cases) (internal quotations marks omitted).

The Amendment unquestionably prohibits a substantial amount of protected expression and speech, both in an absolute sense and due to the sweeping overbreadth of the Amendment

relative to any legitimate regulatory need. Accordingly, Plaintiffs have sufficiently stated First Amendment claims upon which relief can be granted, and Plaintiffs are likely to prevail on the merits of their claims.

A. The Amendment Violates Plaintiffs' Freedom of Association

1. The Amendment Violates MRP's Right to Association[2]

The Supreme Court has long recognized the right of association as an inseparable aspect of the "liberty" protected by the First Amendment. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986) (citing cases); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982); *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). This associational freedom includes the right to engage in collective action in order to advance common political interests. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Included within the right to collective action is the right of a political party to select its representative or "standard bearer." *See Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989) ("Freedom of association . . . encompasses a political party's decisions about the identity of, and the process for electing, its leaders."); *Tashjian*, 479 U.S. at 224 ("The Party's determination of the boundaries of its own association . . . is protected by the Constitution."); *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981) (holding that a political party's choice of method to determine which individuals will comprise its delegation is protected by the Constitution).

[2] Defendant's Motion to Dismiss (ECF No. 41) incorporates by reference and relies upon the arguments set forth in her contemporaneously filed Response to Plaintiff's Motion for Preliminary Injunction (ECF No. 37). Accordingly, Plaintiffs incorporate by reference and rely upon the law and arguments set forth in their Motion for Preliminary Injunction (ECF No. 3).

The right of a political party to select its standard bearers and to exclude persons from membership that it believes do not represent its ideals was analyzed and discussed in *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000), in which the Supreme Court recognized:

> The formation of national political parties was almost concurrent with the formation of the Republic itself. Consistent with this tradition, the Court has recognized that the First Amendment protects the freedom to join together in furtherance of common political beliefs, ***which necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only***. That is to say, ***a corollary of the right to associate is the right not to associate***.

Id. at 574 (emphasis added) (internal citations and quotation marks omitted). In sum, "[f]reedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." *Id.*

In *Jones*, the Court noted that its history of cases "vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'" *Id.* at 575 (quoting *Eu*, 489 U.S. at 224). Likewise, other appellate courts have affirmed the right of a political party to determine its association. *See, e.g.*, *Democratic Party of Washington v. Reed*, 343 F.3d 1198, 1204 (9th Cir. 2003) ("The right of people adhering to a political party to freely associate is not limited to getting together for cocktails and canapes. Party adherents are entitled to associate to choose their party's nominees for public office."); *LaRouche v. Fowler*, 152 F.3d 974, 996 (D.C. Cir. 1998) ("The Party's ability to define who is a 'bona fide Democrat' is nothing less than the Party's ability to define itself."); *Duke v. Massey*, 87 F.3d 1226, 1232 (11th Cir. 1996) (holding that a political candidate did not have a right to associate with an "unwilling partner" political party) (citing *Duke v. Cleland*, 954 F.2d 1526, 1530 (11th Cir. 1992)).

As demonstrated by these cases, the Amendment violates MRP's fundamental right to associate and, conversely, its right not to associate. Under the Amendment, applicants for Commissioner self-designate their affiliation with one of the two major political parties without any involvement or consent of that political party. *See LaRouche*, 152 F.3d at 997 ("Nor is the Party required to accept [the candidate's] self designation as the final word on the matter."). This is particularly problematic given that Michigan does not have a system of party registration as a preexisting validator of affiliation, and the Amendment does not define, explain, or in any way seek to clarify what it means to "affiliate" with a political party, so there is no practical way to verify the self-designated affiliation. Thus, the Amendment disqualifies individuals who are most easily identified as bona fide affiliates of MRP (including declared candidates, elected officeholders, and party leaders, whether federal, state, or local), leaving MRP and its members with almost no reliable means to determine an applicant's true political affiliation. The Amendment can, and likely will, result in a situation where those who do not truly represent MRP are selected as Republican Commissioners and, by implication, representatives or standard bearers of the party.

These potential adverse outcomes are not remote or speculative, but instead are the very outcomes contemplated by courts that have struck down political selection processes that are conducted without the political party's involvement. *See, e.g.*, *Reed*, 343 F.3d at 1204 ("The Washington scheme denies party adherents the opportunity to nominate their party's candidate free of the risk of being swamped by voters whose preference is for the other party."). Those who are selected to become Republican Commissioners become standard bearers of the party, yet the Amendment divests MRP of any role in selecting its standard bearers on the Commission even though Republican Commissioners will speak as apparent representatives of the party. Such a

system cannot withstand constitutional scrutiny. *See Jones*, 530 U.S. at 575 (recognizing that freedom of group association of a political party presupposes the freedom to "select[] a standard bearer who best represents the party's ideologies and preferences.").

The Amendment goes even further in violating MRP's associational rights by expressly allowing a legislative leader of the *opposite* party to strike its Republican applicants. In other words, the Amendment not only determines MRP's political association through random chance, but it also allows the Democratic Party to exercise control over MRP's process for selecting its standard bearers by allowing Democratic leaders the ability to strike applicants who affiliate with the Republican Party. This improper influence on a political party's selection process is precisely the type of unconstitutional activity struck down by the courts in *Jones* and *Reed*.

Defendant Benson's Motion to Dismiss, and corresponding Response to Motion for Preliminary Injunction, is premised on the fallacy that redistricting is intended to be—or even can be—apolitical. (*See, e.g.*, Lead Case, ECF No. 45, Def. Benson's Resp. in Opp. to Pls.' Mot. for Prelim. Injunc. (hereinafter, "Def. Benson's Resp."), PageID.638-639 ("Significantly, Commissioners are selected from a pool of applicant *voters* to serve on a commission that is independent of the government and of the political parties. . . . The entire point of the amendment is that the Commissioners are not speaking for the party—they are speaking as voters and attempting to draw district maps that do not politically advantage any party.").)

In the first instance, "[d]rawing district lines is an inherently political process." *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867, 881 (E.D. Mich. 2019). As the Supreme Court explained:

> Politics and political considerations are inseparable from districting and apportionment. . . . It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are

> rarely neutral phenomena. . . . The reality is that districting inevitably has and is intended to have substantial political consequences.

Gaffney v. Cummings, 412 U.S. 735, 753 (1973).

Moreover, the Amendment is *not* apolitical, and does not pretend to be. While Defendant Benson argues that the Commission is intended to be "independent . . . of the political parties," (Lead Case, ECF No. 45, Def. Benson's Resp, PageID.639), the very language of the Amendment ***requires*** affiliation with those parties:

> The secretary of state shall . . . [r]equire applicants to attest under oath that they meet the qualifications set forth in this action; and either that they affiliate with one of the two political parties with the largest representation in the legislature (hereinafter, "major parties"), and if so, identify the party with which they affiliate, or that they do not affiliate with either of the major parties.

Mich. Const. art. 4, § 2(a)(3).

Perhaps recognizing the quagmire of purporting to make the Commission apolitical when in fact the primary selection criteria is political affiliation, Defendant Benson attempts to explain it away:

> In examining the amendment, it is foreseeable that the court may question why the amendment references parties at all. The answer is that if the Commissioners were simply chosen from all voters at random, there would exist the possibility that—through random chance—the pool would be comprised of a greater number affiliating with one party than the others. Such an outcome would turn a system intended to create a rational and deliberative body into a mere lottery.

(Lead Case, ECF No. 45, Def. Benson's Resp, at PageID.641.) But that explanation only underscores what we know to be true: political affiliation is relevant to the redistricting process. *See League of Women Voters*, 373 F. Supp. 3d at 881; *Gaffney*, 412 U.S. at 753. And if—as Defendant Benson concedes—political affiliation influences redistricting, Plaintiffs have the constitutional right to "select[] a standard bearer who best represents the party's ideologies and

preferences." *Jones*, 530 U.S. at 575. Otherwise, "[f]reedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasion that underlie the association's being." *Id.* at 574.[3]

The threat to Plaintiffs' associational rights is all the more evident given the major political parties' right to strike applicants of the *opposite* party. While Defendant Benson asserts that the purpose of the Commission is to draw maps that "do not politically advantage any party," (Lead Case, ECF No. 45, Def. Benson's Resp., PageID.639), the draft application published by the Secretary suggests otherwise. The draft application asks applicants—for the stated purpose of informing political leaders' right to strike applicants from consideration—to "describe why—or how—you affiliate with either the Democratic Party, Republic Party, or neither." Member Case, ECF No. 3, Br. in Support of Pls.' Mot. for a Prelim. Injunc., PageID.52.) It is beyond doubt that Democratic political leaders could strike a candidate because of particular ideologies held by a Republican candidate (and vice versa); perhaps a Republican candidate is "too" Republican or insufficiently centrist (in the Democratic leader's estimation). Likewise, a Republican candidate

[3] Defendant Benson attempts to distinguish *Jones* and its progeny by arguing that the Commissioners will be voters, rather than candidates or nominees. (Lead Case, ECF No. 45, Def. Benson's Resp., PageID.639.) First, while *Jones* emphasizes the importance of the right of association in the process of selecting a nominee, the right of association is not limited to that process. *See* 530 U.S. at 575. Instead, the cornerstone of the right of association—and the corresponding right *not* to associate—is that a party's "determination of the boundaries of its own association . . . is protected by the Constitution." *Tashjian*, 479 U.S. at 224. Second, the distinction between candidates or nominees, on the one hand, and politically vetted applicants, on the other, is not so great as Defendant Benson suggests. Applicants for the Commission must identify and attest to their party affiliation, just as Michigan candidates must attest to their party affiliation in an Affidavit of Identity. Applicants are asked to disclose the basis for their party affiliations and are then subject to a vetting process by major political leaders. Indeed, Defendant Benson concedes that "because the Commission will play a fundamental role in Michigan's electoral process . . . , **the amendment is akin to an election regulation**." (Lead Case, ECF No. 45, Def. Benson's Resp., PageID.642 (emphasis added).)

could genuinely espouse bases for affiliating with the Republican Party that party leaders do not believe actually align with party ideology. Notwithstanding, the Amendment allots each leader only five strikes, and after the leaders use those strikes, the party must live with a candidate who does not hold its core ideologies. This is no less a "lottery" than if the process did not reference political affiliation at all, and is precisely the kind of inter-party raiding the constitutional right to association seeks to prevent. *See Jones*, 530 U.S. at 579 (holding that, even if the prospect of "malicious crossover voting, or raiding, is slight, . . . a single election in which the party nominee is selected by nonparty members could be enough to destroy the party," and, at best, would "severely transform [the party]"); *Tashjian*, 479 U.S. at 224 ("[A] State, or a court, may not constitutionally substitute its own judgment for that of the Party.").[4]

Defendant Benson readily acknowledges the necessity of a politically balanced Commission. It is not for the State to determine who does and does not constitute Plaintiffs' association, and thus what that political balance looks like, or force MRP to associate with individuals against its will. Accordingly, Plaintiffs have stated a claim for violation of the First Amendment right to association.

2. The Amendment Violates the Individual Plaintiffs' Right to Association.

Government regulation that infringes on associational freedom can take many forms. *Roberts*, 468 U.S. at 622-23 ("Among other things, government may seek to impose penalties or withhold benefits from individuals because of their membership in a disfavored group; it may

[4] Nor is it a sufficient "remedy" that an inter-party raider could be subject to removal and/or criminal penalties. Will the maps be redrawn? The Amendment does not provide for such a remedy. Instead, arguably, the Michigan Supreme Court has the discretion to review challenges to a *plan*, but not to the makeup of the Commission itself. *See* Mich. Const. art. 4, § 6(19). As the Supreme Court recognized, "is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area." *Gaffney*, 412 U.S. at 753. The consequences cannot be rectified by mere removal from the Commission.

attempt to require disclosure of the fact of membership in a group seeking anonymity; and it may try to interfere with the internal organization or affairs of the group." (internal citations omitted)). Here, the Amendment excludes the individual Plaintiffs and a significant number of others from participation on the Commission due to the overly broad disqualifying criteria, which are predominantly based on political activity and expression. Essentially, the Amendment bars any would-be applicant who, in the preceding six years, has sought to advance political matters through their associational activities, including declared candidacy for partisan office, holding partisan elected office, political party leadership, and similar criteria. *See* Mich. Const. art. 4, § 6, pt. (1)(b); *see also Kusper*, 414 U.S. at 56 (recognizing the right to "associate with others for the common advancement of political beliefs and ideas"); *Grizzle v. Kemp*, 634 F.3d 1314, 1325 (11th Cir. 2011) ("Candidacy for office is one of the ultimate forms of political expression in our society.").

Acting as a total bar to eligibility to serve on the Commission, the disqualifying criteria deny individual Plaintiffs an opportunity to apply for public office with the Commission, unless Plaintiffs are willing to give up First Amendment associational freedoms. It is well settled that government may not permissibly deny employment based on the exercise of First Amendment freedoms. *Adkins v. Bd. of Educ.*, 982 F.2d 952, 955-56 (6th Cir. 1993) ("Although [the plaintiff] had no property right to continued employment ***she had a liberty interest in not being denied employment for exercising her First Amendment right to freedom of association***. That such a right exists cannot be denied, at least since" *Roberts*, 468 U.S. at 609. (emphasis added)). Fully precluding Plaintiffs from an opportunity to serve on the Commission, the disqualifying criteria impose a substantial burden on Plaintiffs' political association, creating an impossible choice between foregoing First Amendment political activities that further their association with MRP, on the one hand, and continuing their associational activities at the cost of deemed ineligibility

from the Commission, on the other hand. Although some regulation of political activity may be justified in certain cases, the Amendment goes much too far.

The Amendment exceeds the limits of permissible government regulation of political participation that was upheld, for example, in *U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (upholding a provision of the Hatch Act that prohibited executive branch employees from participating in certain political activities); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (involving a state statute that restricted political activities of civil servants); and *Clements v. Fashing*, 457 U.S. 957 (1982) (upholding a state constitutional regulation that limited current public officials' access to candidacy for other political offices). In each of the cases, the subject regulations involved restrictions on activities of public officials *during their current term of office*. The subject regulations did not, however, limit an individual's access to public office because of *prior* politically expressive activities, like the regulations at issue in this case.[5]

The Amendment is much more severe. It does not limit political activity only during an individual's term of office on the Commission to address undue influence, or the appearance of

[5] Defendant VNP attempts to overcome this fact by pointing to cases involving term limits, conflict-of-interest recusals, and resign-to-run requirements. (Lead Case, ECF No. 36, Def. VNP's Resp., PageID.463.) Those cases are inapposite. *Citizens for Legislative Choice v. Miller*, 144 F.3d 916 (6th Cir. 1998), involved a challenge to lifetime term limits, which apply to particular public offices and simply establish a temporal limit on service *in that public office*. The term-limit regulation does not ban an individual from seeking *other* public office. In fact, upholding the regulation as constitutional, the Court expressly recognized that "the plaintiffs have many other avenues to express their preferences. . . . ***They can vote for the term-restricted candidates for other offices***." *Id.* at 922 (emphasis added). Similarly, *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117 (2011), involved a challenge to an ethics provision requiring the recusal of a legislator in the event of a conflict of interest. The rule did not disqualify any individual from public service, like here. And, finally, *Clements*, 457 U.S. at 957, involved a challenge to a regulation limiting the ability of certain *current public officials* from seeking a position in the legislature and to regulations imposing a "resign to run" requirement. Unlike the regulations in that case, the Amendment is substantially broader in application, disqualifying individuals not only because of current public service, but also because of politically expressive activities that may have occurred nearly six years prior, as well as disqualifying the family members of those individuals.

influence, by current public employees and officials; instead, it creates a prospective, *total bar* to service on the Commission based on political activities *that occurred within the preceding six years*, regardless whether or not those political activities would continue during the individual's term as a Commissioner. Worse yet, the disqualification is imputed to the family members of the individuals, whether or not the family members personally participated in the subject political activities. *See* Mich. Const. art. 4, § 6, part (1)(c).

In *Kusper*, the Supreme Court considered a challenge to a State statute that prohibited a person from voting in the primary election of a political party if that person voted in the primary of any other party within the preceding 23 months. In holding the regulation unconstitutional, the Court recognized that, although the rule did not "deprive those in the appellee's position of all opportunities to associate with the political party of their choice," it "constituted a 'substantial restraint' and a 'significant interference' with the exercise of the constitutionally protected right of free association." *Kusper*, 414 U.S. at 58. The same is true here. Although the disqualifying criteria do not necessarily prohibit individuals from all political activity in order to remain eligible for the Commission, the Amendment constitutes a *substantial restraint* and a *significant interference* with the right of free association by disqualifying would-be applicants from service based on activities representing the "ultimate forms of political expression in our society," including candidacy. *Grizzle*, 634 F.3d at 1325. And the burden imposed by the Amendment is more than three times greater in duration than the rule invalidated in *Kusper*. "[A] significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest." *Kusper*, 414 U.S. at 58; *see also Citizens for Legislative Choice*, 144 F.3d at 921 ("It is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint [or] associational

preference."). Defendant cannot satisfy its burden to show that the Amendment is narrowly drawn to advance a compelling State interest.[6]

Defendant contends that the State's interest here is compelling because of the State's "autonomy to establish [its] own governmental processes." (*See* Lead Case, ECF No. 45, Def. Benson's Resp., PageID.644.) Plaintiffs do not dispute that the State is a sovereign body empowered to govern itself. However, any such authority remains subject to constitutional limitations. *Tashjian*, 479 U.S. at 217 (recognizing that the State's authority to govern itself "does not extinguish the State's responsibility to observe the limits established by the First Amendment right of the State's citizens"); *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) ("[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution."). Defendant further argues that the regulation can be justified due to the purported interest in eliminating actual or perceived conflicts. (*See* Lead Case, ECF No. 45, Def. Benson's Resp., PageID.645-649.) But less restrictive alternatives are available to eliminate any conflicts of interest, many of which exist already in

[6] Defendant Benson asserts, as a matter of fact and without citation to any authority, that the *Anderson/Burdick* balancing test applies in these circumstances. (Lead Case, ECF No. 45, Def. Benson's Resp., PageID.642-643.) To the contrary, the *Anderson/Burdick* test was borne out of the review of regulations "of parties, elections, and ballots to reduce election—and campaign—related disorder" and it applies only to "deciding whether a state election law violates First and Fourteenth Amendment associational rights[.]" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (emphasis added). In that vein, courts considering associational challenges not raised in the framework of elections or campaigns—such as the challenges raised by Plaintiffs here—have rejected the less-stringent *Anderson/Burdick* test in favor of strict scrutiny. *See Boston Correll v. Herring*, 212 F. Supp. 3d 584, 610 n.23 (E.D. Va. 2016). Regardless, even assuming the *Anderson/Burdick* test applies in these circumstances, the Amendment imposes a severe burden and may be justified only if the regulation is narrowly tailored to advance a compelling government interest. *Burdick v. Takushi*, 504 U.S. 438, 434 (1992). Defendant cannot overcome this burden.

Michigan. *See, e.g.*, Mich. Const. art. 11, § 1 (requiring public officers to take and subscribe to an oath to "faithfully discharge the duties of the office"); Mich. Comp. Laws § 15.182 (prohibiting public officers from holding two or more incompatible offices at the same time); *People ex rel. Plugger v. Twp. Bd. of Overyssel*, 11 Mich. 222, 226 (1863) ("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.").

There is no rational basis, let alone a compelling reason, to broadly exclude all "parents, stepparents, children, stepchildren and spouses" of disqualified individuals under Mich Const. art 4, § 6, subpt. (1)(c). The overly broad exclusion provision is factually distinguishable from the anti-nepotism provisions regarding the lottery and juries cited by Defendant Benson (Lead Case, ECF No. 45, Def. Benson's Resp., PageID.664-665), because there is no factual scenario under which the exclusion of these individuals accomplishes the goal of preventing nepotism. In order to present a potential nepotism issue, one person must have the power to bestow a benefit on a relative. Black's Law Dictionary 1201 (10th ed. 2009). Equally important, the logical corollary is that the relative must be in a position to receive the benefit concurrently with the other person's power to bestow the benefit. *See Bretz v. Center Line*, 276 N.W.2d 617 (Mich. Ct. App. 1979) (overturning a city's anti-nepotism provision where the relatives were both lifeguards and neither had the power to provide a benefit to the other).

The anti-nepotism cases that Defendants cite are distinguishable because they are limited to situations where relatives concurrently would be in a position to provide and receive a benefit, but a substantial number of the excluded individuals under the Amendment are not in a position to benefit from a relative's potential selection as a Commissioner. Former candidates, term-limited legislators, and local candidates and officials, for example, are not uniquely affected by the

drawing of State legislative and congressional districts and therefore cannot benefit from how districts are drawn. Thus, the familial exclusion provision is not rationally based on a legitimate government interest, let alone narrowly tailored to achieve a compelling interest.

Finally, Defendant Benson asserts a "compelling interest in having district lines drawn by Commissioners independent of political influence[.]" (Lead Case, ECF No. 45, Def. Benson's Resp., PageID.652.) But as set forth herein by the very terms of the Amendment, Commissioners are not allowed to be "independent of political influence." Instead, eight of the 13 Commissioners are in fact specifically required to associate with a major political party in order to qualify to serve as a Commissioner—a requirement Defendant Benson concedes seeks to create a politically balanced Commission, which is not free from political influence, but instead constitutes the State's acceptance of political influence and attempt to manipulate how it is wielded. To this end, major political party leaders are entitled to strike an applicant on the very basis of his or her adherence to the *opposite* party's ideologies. Plainly, "a law cannot be regarded as protecting an interest of the highest order and thus as justifying a restriction . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *The Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., dissenting) (internal quotations omitted).

Even if the State adequately establishes a compelling interest, the Amendment is not the least-restrictive means to achieve that interest, and thus fails strict scrutiny. Notably, in arguing that the Amendment does not violate the individual Plaintiffs' associational rights, Defendant Benson relies upon the redistricting schemes of two states: Arizona and California. (Lead Case, ECF No. 45, Def. Benson's Resp., PageID.645, 652.) But the redistricting schemes in those states, which respect political parties, only highlight the constitutional infirmity of the Amendment.

For example, the Arizona redistricting commission consists of five members—two from each major political party and one unaffiliated member. Ariz. Const. art. 4, pt. 2, § 1(3). For a member who affiliates with a political party, the amendment requires that the member "be a registered Arizona voter who has been continuously registered with the same political party . . . for three or more years immediately preceding appointment[.]" *Id.* The Arizona systems includes some restrictions on past political activity—for a period of three years, half the time prescribed by the Amendment—but does not extend those restrictions to the applicant's family. *See id.* After a pool of qualified nominees is established, the major political party leaders are then empowered to appoint the four party-affiliated applicants to the commission; the four commissioners then select a fifth, unaffiliated commissioner. *Id.* §§ 1(6), (8). This scheme operates in stark contrast to the Amendment, which permits (1) self-identification of voters, without reference to any objective criteria, (2) the opposite political party to strike applicants on the basis of their adherence to the opposing party's ideology, (3) a six-year restriction on past political activity as a total bar to membership, and (4) a concomitant six-year total bar to membership for the family members of those who engage in political activity.

Likewise, in California, the redistricting commission similarly excludes "immediate family" members of certain political actors from serving on the commission. Cal. Gov't Code. § 8252(a)(2)(A). But the California scheme narrows that exclusion significantly more than the Amendment. First, the California statute defines "immediate family" as "one with whom the person has a bona fide relationship established through blood or legal relation, including parents, children, siblings, and in-laws." *Id.* § 8252(a)(2)(B). It then further defines "bona fide relationship established through blood or legal relation," restricting "bona fide" relationships to those that are

> so substantial in nature that [they] include any of the following within the preceding 12 months: cohabitation for a period or periods

> cumulating 30 days or more; shared ownership of any real or personal property having a cumulative value of $1,000 or more, or either party to the relationship providing a financial benefit to the other having a cumulative value of $1,000 or more.

Cal. Code Regs. tit. 2, § 60806. Thus, the California statute attempts to address potential conflicts of interest by focusing on common conflicts—like financial intertwinement.

In contrast, the Amendment uses "a blunt axe when a scalpel is called for." *Corso v. Fischer*, 983 F. Supp. 2d 320, 335 (S.D.N.Y. 2013). The Amendment operates as a total bar to application for those who have engaged in political activity for the past six years—and then imputes that purported conflict to "parent[s], stepparent[s], child[ren], stepchild[ren], or spouse[s]" without any further limiting criteria of any kind. Such a restriction goes too far as a matter of law. *See Corso*, 983 F. Supp. 2d at 334-35 (holding that a restriction based on conflict of interest did not withstand strict scrutiny when it was not reasonably limited to address actual conflicts); *Brinkman v. Budish*, No. 1:09-cv-326, 2009 WL 10710527, at *6 (S.D. Ohio Aug. 4, 2009) (same). Moreover, the Amendment goes even further than the California scheme after which Defendant Benson purports it is modeled, (Lead Case, ECF No. 45, Def. Benson's Resp., PageID.645), thus demonstrating, in fact, that there are "less restrictive alternative[s]" that could potentially serve the State's purpose, *Planet Aid v. City of St. Johns*, 782 F.3d 318, 330 (6th Cir. 2015).

As previously explained, Plaintiffs are not necessarily opposed to the general concept of a redistricting commission, but any such redistricting commission must comport with the law, and it is the State's burden to demonstrate that it does. Defendant Benson has failed to demonstrate that the Amendment advances a compelling state interest and that it is narrowly tailored to serve that interest. Accordingly, the Amendment is far too reaching and cannot withstand judicial scrutiny. Plaintiffs have sufficiently stated First Amendment associational claims and are likely to succeed on the merits of their claims.

B. The Amendment Violates Plaintiffs' Freedom of Speech

The First Amendment prohibits the enactment of any law "abridging the freedom of speech." U.S. Const. amend. I. According to the Supreme Court, that clause

> is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Cohen v. California, 403 U.S. 15, 24 (1971).

Pursuant to the First Amendment, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). "***Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional*** and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991) (emphasis added)).

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227 (citing cases). "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 2228 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000).

> This is for good reason. The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. Error in marking that line exacts an extraordinary cost. It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.

Id. at 817 (internal citations and quotation marks omitted).

In this case, the State regulation violates the freedom of speech embodied in the First Amendment because it specifically and overtly regulates speech based on content, including regulations based on the motivating ideology and perspective of the speaker and the outright prohibition of entire topics of speech—topics involving core political speech at the heart of the First Amendment. The State cannot overcome its burden to justify the constitutionality of these unprecedented speech restrictions.

1. Viewpoint Discrimination

"Government discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.'" *Reed*, 135 S. Ct. at 2230 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). The United States Supreme Court has recognized that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *McCutcheon v. FEC*, 572 U.S. 185, 207 (2014) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)). The Amendment violates these basic principles, specifically favoring applicants who do not affiliate with either major political party over applicants who affiliate either major political party, including applicants affiliating with the Republican Party.

Based on their designated affiliation with one of the two major political parties, or lack thereof, pursuant to Mich. Const. art. 4, § 6, subpt. (2)(a), qualified applicants are placed in one of three applicant pools. *See* Mich. Const. art. 4, § 6, subpts. (2)(a)(iii) and (2)(d)(ii) (describing classes of applicants and applicant pools). Stated differently, under the Amendment, qualified ***applicants are sorted*** by their motivating political ideology, opinion, or perspective.

Applicants in each pool are not treated equally. Applicants who attest that they do not affiliate with a major political party receive the benefit of a larger applicant pool and a greater number of seats on the Commission, thereby increasing the likelihood that a non-affiliating applicant will be selected as a Commissioner, as compared to an applicant in another pool. *See* Mich. Const. art. 4, § 6, subpts. (2)(d)(ii) and (2)(f). And non-affiliating applicants, as a group, are guaranteed more seats than each group of affiliates of a major political party. This minority allocation for Republican affiliates is promised under the Amendment. Therefore, by specifically allocating commissioner seats based on political affiliation—*a minority of which are reserved to each of the major political parties*—the Amendment unconstitutionally discriminates based on viewpoint. *See Reed*, 135 S. Ct. at 2230.

Defendant contends that, if anything, affiliating members are favored over non-affiliating members, suggesting the pool of non-affiliating applicants is not a unified group, but instead is made up of other sub-classes of individuals, including independents and minor party affiliates. (*See, e.g.*, Lead Case, ECF No. 36, Def. VNP's Resp., PageID.465; Lead Case, ECF No. 38, Br. in Support of VNP's Mot. to Dismiss, PageID.513 Lead Case, ECF No. 45, Def. Benson's Resp., PageID.654-656.) Defendant's analysis misses the mark. What distinguishes the third class of applicants is not the identity of the minor party, if any, with which the applicants affiliate—***it is that the applicants do not affiliate with either major party***. Stated differently, all the applicants

in this pool choose to not affiliate with the Democratic Party or the Republican Party. The non-affiliating applicants have a unified "do not affiliate with either major political party" perspective or viewpoint, a perspective attested to under oath by the applicants.

Defendant VNP argues that, in any event, "[n]o First Amendment interests are implicated by the allocation of seats" on the Commission, citing a Supreme Court decision regarding the act of voting by legislators, *Nev. Comm'n on Ethics*, 564 U.S. at 117. (Lead Case, ECF No. 36, Def. VNP's Resp., PageID.466.) Although the official act of casting a vote may not be protected under the Speech Clause of the First Amendment, that does not foreclose a challenge to a government regulation burdening "what undoubtedly is speech" involving a legislator. Justice Kennedy explained:

> Quite apart from the act of voting, speech takes place both in the election process and ***during the routine course of communications between and among legislators, candidates, citizens, groups active in the political process, the press, and the public at large. This speech and expression often finds powerful form in groups and associations with whom a legislator or candidate has long and close ties, ties made all the stronger by shared outlook and civic purpose.*** The process is so intricate a part of communication in a democracy that it is difficult to describe in summary form, lest its fundamental character be understated.

Nev. Comm'n on Ethics, 564 U.S. at 129-30 (Kennedy, J., concurring) (emphasis added).

Commissioners who share a political affiliation also are likely to share ideologies or viewpoints about a variety of topics, some of which undoubtedly influence their perspectives about redistricting beyond the impermissible subjects outlined in the Amendment. *See* Mich. Const. art. 4, § 6, subpts. (13)(d)-(e) (describing impermissible subjects such as providing a disproportionate advantage to a political party or favoring or disfavoring an incumbent elected official or candidate). Thus, the Amendment *does* implicate Commissioners' protected speech, if not through the act of voting, then through other speech that necessarily attends service as a Commissioner. With this in

mind, it is obvious that the Amendment regulates speech based on prospective Commissioners' partisan ideology. *See Carey v. Brown*, 447 U.S. 455, 463 (1980) ("Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard.").

To the extent the regulations are intended to promote the Commission's actual or perceived "independence," that allegedly benign motive cannot save the Amendment. "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Reed*, 135 S. Ct. at 2229. Accordingly, it is irrelevant that the Amendment was well-intentioned to promote independence, if that in fact is the case. What is relevant is that the Amendment creates a system whereby speech is regulated based on the specific motivating ideology or political perspective of the speaker—contrary to the First Amendment. *Id.* at 2230.

Any number of alternatives exist to the system established under the Amendment. For example, like in Idaho, members of the Commission could be appointed by the four state legislative leaders and by the state chairmen of the two largest political parties in the state. *See* Idaho Const. art. 3, § 2. Or the four state legislative leaders could appoint some Commissioners, and those Commissioners could then select additional members of the Commission, like the system in Arizona. *See* Ariz. Const. art 4, pt. 2, § 1(8). Or the Amendment could have ignored partisan affiliation altogether. However, Plaintiffs do not bear the burden of proposing a new system that would withstand constitutional scrutiny. It is adequate that less restrictive alternatives exist. *See*

Playboy Entm't, 529 U.S. at 816. Accordingly, Plaintiffs have stated a valid First Amendment claim and are likely to prevail on the merits of their claim.

2. Restricted Speech

The Amendment also imposes a content-based regulation that prohibits speech regarding an entire topic, one involving core political speech that is at the heart of First Amendment protection. Mich. Const. art. 4, § 6, subsection (11) provides in relevant part:

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

According to the Supreme Court, "it is well established that '[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.'" *Reed*, 135 S. Ct. at 2230 (quoting *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980)). A speech regulation targeted at a specific subject matter is content-based even if the regulation does not discriminate among viewpoints. *Id.*

It cannot reasonably be disputed that the Amendment's speech regulations target a specific subject matter—redistricting—and, therefore, the speech regulations are content based.[7] Consequently, the regulation is subject to strict scrutiny. *Id.* at 2226 ("Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are

[7] The Amendment is completely unlike the Texas Open Meetings Act regulation considered in *Asgeirsson v. Abbot*, 696 F.3d 454 (5th Cir. 2012). In fact, Plaintiffs have noted that the analogous Michigan Open Meetings Act requirement is a less restrictive means available to the State. The Amendment's regulation does not purport to apply to discussions regarding any business or decisions of the Commission, but to "redistricting matters" only.

narrowly tailored to serve compelling state interests). Moreover, the Amendment is substantially overbroad, prohibiting free public discussion between Commission members and staff and the public, regardless if the *redistricting matters* relate to potential business of the Commission. In other words, the Amendment "prohibits a substantial amount of protected speech both in an absolute sense and relative to [its] plainly legitimate sweep." *O'Toole*, 802 F.3d at 789 (citing *Speet*, 726 F.3d at 872) (internal quotation marks omitted). The State cannot overcome its burden of proving the constitutionality of the Amendment because the speech regulations are not narrowly tailored to serve a compelling state interest.

As an initial matter, the Supreme Court has rejected the notion that public employees and officials "may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the [institution] in which they work." *Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968); *see also Lane v. Franks*, 573 U.S. 228, 231 (2014) ("Almost 50 years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment."); *Murphy v. Cockrell*, 505 F.3d 446, 451 (6th Cir. 2007) ("[T]he First Amendment protects the right of public employees to participate in speech involving public affairs."). Stated differently, the government cannot justify the Amendment's speech regulations by the mere fact of employment on the Commission by the regulated individuals, as the topic of restricted speech concerns matters of public interest; in fact, it concerns a matter of core political speech regarding the shaping of legislative districts that create the foundation of representative democracy of the State.

In this case, there is no compelling governmental interest to justify the constitutional speech regulation prohibiting the Commission and its members, staff, attorneys, and consultants

from public discussion of any and all "redistricting matters." Michigan (presumably like most states) generally requires that a public body deliberate toward and render *decisions* in an open meeting. *See generally* Mich. Comp. Laws §§ 15.261-15.275. However, Plaintiffs are unaware of any State regulation that *entirely restricts* the ability of an elected or appointed public official from any and all discussions with members of the public regarding a matter of public concern, like the Amendment. Indeed, appointed and elected public officials often do—and in fact are expected to—interact with constituents and members of the public outside of formal public meetings. The Amendment's restrictions, which purport to limit discussion on a matter of public interest, cannot be justified by any compelling governmental interest.

Defendants contend that the regulation is justified by the governmental interest of transparency. (Lead Case, ECF No. 36, Def. VNP's Resp., PageID.470.) Although transparency is a laudable goal, the regulation is not narrowly tailored and fails scrutiny. The Amendment is overly broad, restricting official and unofficial speech, public or private, on all redistricting matters (*even if wholly unrelated to the work of the Commission*), and it encompasses all Commission staff, including individuals who may have no policymaking authority whatsoever. The regulations do not seek to protect only confidential or privileged matters—the restriction extends to *any* discussion of *any* redistricting matters. Nor does the Amendment apply only to deliberations by a quorum of the Commission, or to communications among Commissioners and staff. Thus, the Amendment cannot survive strict scrutiny. *See Reed*, 135 S. Ct. at 2226.

Michigan law already establishes a less restrictive alternative to the Amendment—the Open Meetings Act requires that a public body deliberate toward and render its decisions in an open meeting. *See generally* Mich. Comp. Laws §§ 15.261-15.275. The sweep of the Amendment is far too broad and unconstitutionally restricts speech.

III. PLAINTIFFS HAVE SUFFICIENTLY STATED AN EQUAL PROTECTION CLAIM UPON WHICH RELIEF CAN BE GRANTED AND ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR CLAIM

The Equal Protection Clause of the Fourteenth Amendment guarantees to all persons the equal protection of the laws. U.S. Const. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."). Accordingly, the State must govern impartially and not draw arbitrary distinctions between persons that are unrelated to a legitimate governmental purpose. Where the government draws distinctions in a manner that implicates fundamental rights, as here, the regulation must be justified by a compelling interest. *See, e.g.*, *Williams*, 393 U.S. at 31 (requiring a compelling government interest to justify a regulation imposing a heavy burden on associational rights); *McCabe v. Sharrett*, 12 F.3d 1558, 1566 (11th Cir. 1994) ("Generally speaking, when a government action or regulation burdens fundamental constitutional rights, the action or regulation is subjected to strict scrutiny and is therefore deemed to infringe those rights unless shown to be narrowly tailored to serve a compelling government interest."); *Clark v. Library of Cong.*, 750 F.2d 89, 94 (1984) ("This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct."). The Amendment draws distinctions between applicants for the Commission in two important ways, neither of which can survive such scrutiny.

A. Qualified Applicants Versus Disqualified Applicants

First, numerous would-be applicants, including the individual Plaintiffs, are disqualified from service based solely on their current or past political activities described in Mich. Const. art. 4, § 6, subpt. (1)(b), and others are disqualified by the sheer coincidence of a familial relationship to such disqualified individuals. These criteria thus distinguish between "qualified" applicants and "disqualified" applicants, withholding from countless would-be applicants an opportunity to

access (or at least apply for) a potential benefit (service as Commissioner) because of their exercise of a fundamental right.

There can be no serious doubt that the politically expressive activities that disqualify would-be applicants from service constitute the exercise of a fundamental right. The expressive activities include candidacy for partisan office, service as an elected official or member of the governing body of a political party, and consultants to political candidates and campaigns, all of which constitute political expression and activity. *See, e.g.*, *Williams*, 393 U.S. at 30 (describing the "right of individuals to associate for the advancement of political beliefs" as ranking "among our most precious freedoms"); *Grizzle*, 634 F.3d at 1325 ("Candidacy for office is one of the ultimate forms of political expression in our society."); *McCabe*, 12 F.3d at 1563 ("The right of expressive association—the freedom to associate for the purpose of engaging in activities protected by the First Amendment, such as speech, assembly, petition for the redress of grievances, and the exercise of religion—is protected by the First Amendment as a necessary corollary of the rights that the amendment protects by its terms. Both the intimate and the expressive association rights are considered fundamental." (internal citations omitted)). The disqualifying criteria create arbitrary distinctions between individuals based on the exercise of a fundamental right, and the regulations fail judicial scrutiny.

The State may not condition Commissioner eligibility on the relinquishment of such venerable constitutional rights. *Id.* at 1562 ("Obviously the government burdens a constitutional right when it imposes a direct penalty such as a criminal fine on its exercise. However, the government may impose a similar burden if it conditions the receipt of a government benefit on the relinquishment of the constitutional right. Imposing such a condition is viewed as burdening the right because it deters exercising the right to the same extent as a direct penalty . . . .") (citing

cases). Yet the Amendment does just that—individuals who in the past six years have exercised, and those who wish to continue to exercise, their associational rights through any of the activities described in Mich. Const. art. 4, § 6, subpt. (1)(b) are ineligible to serve on the Commission.[8] Stated differently, foregoing certain First Amendment rights is a ***condition of eligibility*** to serve as a Commissioner, imposing a severe burden on fundamental associational rights. "A fundamental proposition in our constitutional jurisprudence is that government employment may not be conditioned upon a relinquishment of a constitutional right, including the rights to speech and association guaranteed under the first amendment." *Wilson v. Taylor*, 733 F.2d 1539, 1542 (11th Cir. 1984)) (quoting *Wilson v. Taylor*, 658 F.2d 1021, 1027 (5th Cir. Unit B 1981)).

Defendant contends that rational basis applies to the Equal Protection claim because the Amendment does not severely burden a fundamental right and Plaintiffs are only temporarily disqualified from the Commission. (Lead Case, ECF No. 45, Def. Benson's Resp., PageID.663.) Defendant's analysis misses the point. Plaintiffs face the impossible decision to either cease the particular First Amendment expressive activities, or else be subject to ***ongoing*** disqualification from the Commission. This total bar from service as a Commissioner is temporary only if Plaintiffs give up their First Amendment expression through the activities listed in Mich. Const. art. 4, § 6, subpt. (1)(b). The cases cited by Defendant to support rational basis review are simply inapposite. *See Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012) (involving a tax classification);

[8] The six-year lookback is distinguishable from the limitation of Mich. Const. art. 4, § 6, subpt. (1)(e), which prohibits a Commissioner from holding partisan elective office at the state, county, city, village, or township level for five years ***after*** the date the individual is selected to be a Commissioner. That restriction is a condition of accepting the public office of Commissioner that applies prospectively. It is completely unlike the provisions of Mich. Const. art. 4, § 6, subpts. (1)(b) and (c), which disqualify would-be applicants for expressive political activity that occurred prior to creation of the Commission and which, in most cases, is unrelated to holding public office and, for many, concerns not their own expressive activity but that of a third-party.

Heller v. Doe, 509 U.S. 312, 319 (1993) (involving a claim for heighted scrutiny that was not properly presented to the court); *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (involving a claim for heightened scrutiny where the petitioner attempted to raise the legal rights of third parties). Pursuant to the applicable cases discussing governmental burdens of fundamental rights, strict scrutiny applies. *See, e.g.*, *Williams*, 393 U.S. at 31; *McCabe*, 12 F.3d at 1566.

Defendant cannot justify the regulations by simply pointing to the general purpose of transferring power "from the legislature . . . to the hands of citizens without a personal stake" in redistricting.[9] (Lead Case, ECF No. 45, Def. Benson's Resp., PageID.663-664.) Numerous less restrictive means are available to accomplish that purported interest. For example, the Amendment could have limited political activity concurrent with the term of Commission members and staff, like the limitations of the Hatch Act. 5 U.S.C. § 7323.[10] Similarly, avoiding a perceived conflict of interest is not sufficient reason to justify the imputed disqualification to family members under Mich. 1963, art. 4, § 6, subpt. (1)(c).[11]

[9] In any event, allowing the currently "disqualified" individuals an opportunity to serve on the Commission would not "frustrate" or "negate" the will of the electorate, as Defendant wrongly contends. (*See* Lead Case, ECF No. 45, Def. Benson's Resp., PageID.664.) The Amendment strictly prohibits Commissioners—regardless of their past or current political activity—from proposing or adopting a redistricting plan that provides a disproportionate advantage to a political party and from favoring or disfavoring an incumbent elected official or a candidate. Mich. Const. art. 4, § 6, subpts. (13)(d) and (e). A Commissioner who violates these provisions may be removed from the Commission under Mich. Const. art. 4, § 6, subpt. (3)(e) (providing for removal for "substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office"). Similarly, regulations may require a current legislator to recuse himself or herself from voting if a conflict of interest arises, but that conflict of interest does not disqualify the legislator from continuing to hold office.

[10] Defendant VNP contends that the Hatch Act and related statutes support its position. (Lead Case, ECF No. 32, Def. VNP's Br. Opposing Lead Case Mot. for Prelim. Injunc., PageID.372). But those regulations apply to *currently serving* government employees. Conversely, the Amendment applies to countless individuals—and their family members—who may have been apolitical for nearly six years prior to the creation of a Commission, yet are still disqualified. The Amendment goes much too far.

[11] The phrase "conflict of interest" does not appear in Mich. Const. art. 4, § 6.

Defendant's reliance on cases involving anti-nepotism statutes is misplaced. (Lead Case, ECF No. 45, Def. Benson's Resp., PageID.664-665.) Even assuming those cases stand for the proposition that anti-nepotism regulations can be justified by a compelling government under some circumstances, the Amendment goes much farther than the regulations in those cases, as previously discussed.

Finally, the State could have adopted other less restrictive alternatives. For example, the regulations could have imputed a disqualification only to family members of ***currently serving*** partisan public officials or political party leaders, or it could have limited the imputed disqualification to close family members who are financially dependent on an individual otherwise disqualified under the Amendment. Instead, it was drafted in such a manner to be both overinclusive and underinclusive in operation, rendering it unconstitutional under the Equal Protection Clause.

B. Affiliating Applicants Versus Non-Affiliating Applicants

Second, the Amendment distinguishes among applicants based on their self-designated political affiliation, or lack thereof, with one of the two major political parties. If an applicant is qualified to serve on the Commission, the applicant is placed in one of three pools ***based on political affiliation***. This is the ***only criteria*** used to distinguish among applicants for purposes of the applicant pools. No other factor plays a role in determining the placement of an applicant in any pool—not geography, income, age, gender, or other factor. Again, to emphasize, ***by design the single factor used to distinguish among applicants is political affiliation***.

Consider, for example, two individuals who apply to serve on the Commission. Both applicants are of the same gender and age, live in the same community and type of household (married with two minor children), work at the same company, and earn the same income—the applicants are indistinguishable in every way but one: political affiliation. Yet the Amendment

treats them differently, simply because one applicant affiliates with a major political party, while the other applicant does not affiliate with either major party. It is this simple: Applicants who affiliate with a major political party, such as MRP, are treated differently than non-affiliating applicants—***solely because of their political affiliation***—and affiliating applicants are treated worse. *See Clark*, 750 F.2d at 94 ("Where the government's action inflicts a palpable injury on the individual because of his lawful beliefs, it has the direct and consequent effect of chilling his rights to freedom of belief and association.").

Defendant argues that affiliating members have it better than non-affiliating members, suggesting the pool of non-affiliating applicants does not itself constitute a class, but instead is made up of other sub-classes of individuals, including independents and minor party affiliates. (Lead Case, ECF No. 45, Def. Benson's Resp., PageID.654.) However, such a position directly contravenes the plain language of the Amendment, which creates three pools (classifications) of applicants as follows:

(1) applicants who affiliate with one of the two major political parties;

(2) applicants who affiliate with the other of the two major political parties; and

(3) applicants who do not affiliate with either of the two major political parties.[12]

See Mich. Const. art. 4, § 6, subpts. (2)(a)(iii) and (2)(d)(ii) (describing classes of applicants and applicant pools). The Amendment's express language establishes the applicant pools, and thereby, the classes of applicants for purposes of Equal Protection. Defendant cannot rewrite, or combine,

[12] As previously discussed, what distinguishes the third class of applicants is not the identity of the minor party, if any, with which the applicants affiliate—it is that the applicants do not affiliate with either major party. In other words, *all of the applicants in this class choose to not affiliate with the Democratic Party or the Republican Party*. All of the applicants in the third pool have this trait in common: a unified "does not affiliate with either major political party" perspective or viewpoint.

the classes of applicants in an attempt to now justify the Amendment. (*See* Lead Case, ECF No. 45, Def. Benson's Resp., PageID.655 (arguing for purposes of viewpoint discrimination that the Amendment creates only two classes of applicants).) That is not the appropriate inquiry for purposes of Equal Protection analysis, which must be based on the distinctions drawn by the plain language of the regulation, not on the strained interpretations of Defendant.

Applicants who attest that they do not affiliate with a major political party receive the benefit of a larger applicant pool and a greater number of seats on the Commission, thereby increasing the likelihood that a non-affiliating applicant will be selected for the Commission, as compared to an applicant who affiliates with one of the major political parties. *See* Mich. Const. art. 4, § 6, subpts. (2)(d)(ii) and (2)(f) (providing for pools of applicants and selection of Commissioners). And non-affiliating applicants, as a group (classification), receive more seats than each group of affiliates of a major political party. The degree to which a non-affiliating applicant is benefited by the Commissioner selection process is not the dispositive question (although granting 25 percent more seats to the pool of non-affiliating applicants as compared to each pool of affiliating applicants is a decided advantage)—the issue is that affiliating applicants and non-affiliating applicants receive ***different treatment*** based on their fundamental right of political association. Such unequal treatment is not speculative—***it is promised under the Amendment***, which provides for a smaller applicant pool and allocates fewer positions on the Commission for each pool of affiliating applicants. *See Williams*, 393 U.S. at 23 (holding unconstitutional a state election law that gave a decided advantage to certain political parties); *Griffin v. Padilla*, Case No. 2:19-cv-01477, Order Granting Pls.' Mot. for Prelim. Injunc. (E.D. Cal. Oct. 1, 2019) (holding there was no basis for a State regulation subjecting party-backed candidates and independent candidates to different burdens) (copy attached as **Exhibit A**).

Defendant's suggestion that rational basis applies is incorrect because the distinctions drawn by the Amendment burden the fundamental right of association. Plaintiffs (including members and affiliates of MRP) must ***publicly abandon their political affiliation*** with MRP (under oath) in order to receive the same treatment afforded to non-affiliating applicants, or otherwise endure unequal treatment in the Commissioner selection process. These burdens are nothing less than severe, requiring Plaintiffs to ***give up a fundamental right*** to be placed in the same pool as non-affiliating applicants. Such severe burden on Plaintiffs' fundamental rights requires more than a rational basis.

Defendants argue that the Amendment is no different than other government regulations that account for partisan affiliation in public employment or the composition of a public body. Although it may be true that political affiliation may be an appropriate requirement for certain public employment, *Branti v. Finkel*, 445 U.S. 507 (1980), the exercise of that authority must survive scrutiny—Plaintiffs are unaware of any case involving a State rule that guarantees a ***minority representation*** to a political party on a so-called "politically balanced" commission, relative to other defined political groups. ***Without exception***, all of the commissions cited by Defendants provide for a ***maximum number*** of members who may be affiliated with the same political party—***the regulations for the commissions do not guarantee a minority of seats to a party***, like the Amendment does.[13] *See* 15 U.S.C. § 41 (establishing the Federal Trade Commission and providing that "[n]ot more than three of the [five] commissioners shall be members of the same political party"); 15 U.S.C. § 78d (establishing the Securities and Exchange Commission and providing that "[n]ot more than three of [the five] commissioners shall be members of the same

[13] Nor does the process for appointing members to such commissions vary based on political affiliation of the prospective member, in contrast to the Amendment.

political party"); 42 U.S.C. § 2000e-4 (establishing the Equal Employment Opportunity Commission and providing that "not more than three of [the five members] shall be members of the same political party"); 42 U.S.C. § 7171 (establishing the Federal Energy Regulatory Commission and providing that "[n]ot more than three members of the Commission shall be members of the same political party"); 47 U.S.C. § 154 (establishing the Federal Communications Commission and providing that "the maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitute a majority of the full membership of the Commission [i.e., not more than three commissioners]"); 47 U.S.C. § 396 (establishing the Corporation for Public Broadcasting and providing that "[n]o more than 5 members . . . may be members of the same political party"); 52 U.S.C. § 30106 (establishing the Federal Election Commission and providing that "[n]o more than 3 members of the Commission appointed [by the President] may be affiliated with the same political party); *see also* Mich. Const. art. 2, § 7 (establishing the Michigan board of state canvassers and providing that "[a] majority of any board of canvassers shall not be composed of members of the same political party"); Mich. Const. art. 5, § 28 (establishing the Michigan state transportation commission and providing that "not more than three of [six commissioners] shall be members of the same political party); Mich. Const. art. 5, § 29 (establishing the Michigan civil rights commission and providing that "not more than four of [eight commissioners] shall be members of the same political party"); Mich. Const. art. 11, § 5 (establishing the Michigan civil service commission and providing that "not more than two of [four commissioners] shall be members of the same political party").[14] Unlike the other public bodies referenced by Defendant,

[14] Likewise, Defendant VNP's reliance on *Hechinger v. Martin*, 411 F. Supp. 650 (D.D.C. 1976) and *LoFrisco v. Schaffer*, 341 F. Supp. 743 (D. Conn. 1972) is misplaced because the challenged

the Amendment ***guarantees that each pool of applicants will have an unequal opportunity*** for selection and also guarantees that each pool of applicants will not be equally represented on the Commission.

The Amendment cannot survive strict scrutiny review because numerous less restrictive means are available. For example, the Amendment could have allocated four seats each to the pools of applicants who affiliate with a major party and four seats to the pool of applicants who do not affiliate with either major party. To the extent that deadlock on the Commission was perceived as an issue, the Amendment could have provided for the appointment of an additional Commissioner by the 12 randomly selected Commissioners, similar to the redistricting system in Arizona. *See* Ariz. Const. art 4, pt. 2, § 1(8). But Plaintiffs are not required to formulate a rule that would pass constitutional muster.

To be clear, Plaintiffs are not seeking any *advantage* in the Commissioner selection process. To the contrary, Plaintiffs are seeking only the same (equal) treatment given non-affiliating applicants. Plaintiffs have stated an Equal Protection claim upon which relief can be granted, and Plaintiffs are likely to succeed on the merits of their claim.

IV. PLAINTIFFS HAVE STANDING TO BRING THEIR CLAIMS

The Supreme Court has "established that the irreducible constitutional minimum of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (internal citation and quotation marks omitted). "Injury in fact" is a harm that is "concrete and actual or

regulations in those cases also involved "not more than" or "maximum" provisions—unlike the Amendment, the regulations did not guarantee a specific minority number of seats to a political party.

imminent, not conjectural or hypothetical." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (internal citation and quotation marks omitted). And "[r]edressability" is "a likelihood that the requested relief will redress the alleged injury." *Id.* In their motions, Defendants argue that Plaintiffs have not adequately shown injury in fact and redressability. To the contrary, Plaintiffs satisfy all three elements and have standing to bring this lawsuit.

A. Plaintiffs Have Suffered an Injury in Fact

As noted above, an injury in fact can be "imminent," rather than "actual," "but only when 'the threatened injury is real, immediate, and direct.'" *Crawford v. United States Dep't of the Treasury*, 868 F.3d 438, 454 (6th Cir. 2017) (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)). Further, when a plaintiff alleges threatened government action, the plaintiff need not expose him- or herself to the law whose constitutionality is being challenged; even if the plaintiff's inaction eliminates the imminent threat of denial, it "does not eliminate Article III jurisdiction." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). "[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (citing cases). When a plaintiff's injury is the chilling or deterring effect of a governmental action, that "challenged exercise of governmental power" must be "regulatory, proscriptive, or compulsory in nature, and the complainant" must be "either presently or prospectively subject to the regulations, proscriptions, or compulsions that he [is] challenging." *Id. See also ACLU v. NSA*, 493 F.3d 644, 661 (6th Cir. 2007) (stating that in such a case a plaintiff must allege "direct governmental constraint" that was "threatened" or "contemplated against them").

Here, Plaintiffs have articulated a sufficient injury in fact for each Count: Count I—that anyone can simply call themselves a Republican and represent the Republican Party on the

Commission significantly infringes MRP's freedom of association, (Member Case, ECF 1, the Complaint, PageID.16-18, ¶ 72, subpts. (a)-(k)); Count II—Plaintiffs' freedom of association is severely burdened, as the regulation imposes the "untenantable decision to either limit their political association" or "be subject to automatic and absolute exclusion from service on the commission," (*id.* at PageID.19, ¶ 82); Count III—the Amendment, in reserving only four positions for affiliated Republicans, "discriminates against applicants based on viewpoint, specifically the viewpoints association with" the Republican party, and therefore severely burdens Plaintiffs' freedom of speech, (*id.* at PageID.21, ¶ 96); Count IV—the Amendment tightly restricts the speech of the Commission's members, staff, attorneys, and consultants—at least several of whom must be MRP members or affiliates—which significantly deters Plaintiffs from joining the Commission and, thus, significantly burdens their freedom of speech, (*id.* at PageID.21, ¶¶ 103-104); and Count V—the Amendment discriminates against applicants on the basis of who they are—i.e., subjecting MRP and its members and affiliates to disparate treatment in the selection of Commissioners—thus violating Plaintiffs' equal protection rights, (*id.* at PageID.23-24, ¶¶ 120-23).

In summary, the Amendment makes Plaintiffs choose between two options: eligibility to serve on the Commission versus constitutional freedoms of speech, association, and equal protection. In imposing this choice, the Amendment significantly chills and deters the exercise of Plaintiffs' freedoms and is thus unconstitutional. Further, Plaintiffs are challenging a prospective and ongoing exercise of governmental power (implementation of the Amendment), and Defendant Benson admits Plaintiffs are subject to these enforcement actions. (Lead Case, ECF No. 45, Def. Benson's Resp., PageID.657.) Plaintiffs need not first apply to the Commission and wait to be

denied, nor must the Commission be constituted. Plaintiffs may bring these claims now because the chilling-effect and denial-of-application injuries are real, imminent, and direct.

Defendant VNP resists this conclusion, arguing that Plaintiffs do not allege an injury in fact, but only a generalized grievance: "[T]hat Plaintiffs are seeking to prevent any implementation or use of the Commission" shows "that their objections to the qualifications for selection to serve are generalized grievances shared by everyone who voted 'no' on Proposal 18-2." (Lead Case, ECF No. 38, Br. in Support of VNP's Mot. to Dismiss, PageID.500-501.)

A generalized grievance is defined as a "common concern for obedience to law." *L. Singer & Sons v. Union Pac. R. Co.*, 311 U.S. 295, 303 (1940). Put another way, a generalized grievance is a claim of harm to "every citizen's interest in proper application of the Constitution and laws" where the plaintiff does not seek relief that "more directly and tangibly benefits him than it does the public at large." *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992)). A commonly shared injury, however, is not per se a generalized grievance, nor does it "disqualify" an injured party from challenging the governmental action. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686 (1973). In other words, "[a] claim is not a generalized grievance solely because the injury is shared in substantially equal measure by a large group of citizens." *Pub. Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir. 1993).

When considering whether a harm is a generalized grievance, examples may be the best teacher. A Supreme Court and a Sixth Circuit case showcase generalized grievances. First, in *Hollingsworth*, 570 U.S. at 693, a same-sex couple challenged the constitutionality of California's Proposition 8—a successful referendum defining marriage as between one man and one woman. When the State of California lost in the district court, it refused to pursue an appeal, prompting

Proposition 8's proponents to intervene and pursue the case in the Ninth Circuit Court of Appeals and in the Supreme Court. *Id.* Considering the proponents' standing, the Court noted that their only interest "was to vindicate the constitutional validity of a generally applicable California law." *Id.* at 706. Once Proposition 8 was passed, enforcement duties passed to the state, and the proponents had no particularized injury. *Id.* at 707. They had only a generalized grievance and, thus, no standing. *Id.* at 715.

Second, in *Moncier v. Haslam*, 570 F. App'x 553, 553-54 (6th Cir. 2014), the plaintiff, an individual, challenged Tennessee's "plan for the selection, evaluation, and retention of" state appellate court judges as violating the First and Fourteenth Amendments. Rather than assert a "particularized stake in the litigation," the plaintiff stated "general allegations that the manner in which Tennessee selects and retains its appellate-court judges violates his rights *and the rights of all Tennessee voters* under the First and Fourteenth Amendments." *Id.* His complaint focused on the rights of "the people of Tennessee," not himself. *Id.* The court held that "[t]his is precisely the type of generalized grievance courts have found ill-suited for judicial resolution." *Id.* at 557-58.

Unlike the plaintiffs in *Hollingsworth* and *Moncier*, Plaintiffs here are not suing just because they do or do not like a law or because they think they know better. Rather, as exhaustively explained above, Plaintiffs brought this case because the Amendment violates their articulatable, personal, fundamental rights under the Constitution and § 1983. Plaintiffs, instead of asserting abstract opposition to the Commission, allege specific, concrete facts showing a particularized harm—the opposite of a generalized grievance. Indeed, especially for those claims in which MRP's rights are at issue, it is difficult to see who else could even raise these claims.

This case is much more like *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989), and *Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536 (6th Cir.

2004), in which the defendants argued that the plaintiffs had asserted a generalized grievance, but the courts held otherwise. In *Pub. Citizen*, several interest groups argued that the Federal Advisory Committee Act ("FACA") applied to the ABA's rating of judicial nominees. 491 U.S. at 443. They sought access to the ABA's committee documents but were refused. *Id.* at 449. The defendant ABA argued that the plaintiffs lacked standing as they asserted only a "general grievance shared in substantially equal measure by all or a large class of citizens." *Id.* The Court disagreed, holding that although "other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure," that did "not lessen appellants' asserted injury, any more than the fact that numerous citizens might request the same information under" the freedom of information act means denied their request "do not possess a sufficient basis to sue." *Id.* at 449-50.

In *Am. Canoe*, two organizations filed a lawsuit on their members' behalf alleging Clean Water Act violations. 389 F.3d at 539. They argued that unless the local government required the defendants to monitor their pollutant discharge, that lack of information deprived their members "of the ability to make choices about whether it was 'safe to fish, paddle, and recreate in this waterway.'" *Id.* at 542. The court held that the lack of information "might be a 'generalized grievance' in the sense that up to the point they request it, the plaintiffs have an interest in the information shared by every other person, but it is not an abstract grievance." *Id.* at 545-46. In other words, "the injury alleged is not that the defendants are merely failing to obey the law, it is that they are disobeying the law in failing to provide information that the plaintiffs desire and allegedly need." *Id.* at 546. Consequently, there was no generalized grievance. *Id.*

Similarly, Plaintiffs have shown an injury in fact because they allege and explain how an otherwise broadly violative action *personally* harms them specifically. That the Amendment

violates many constitutional rights is unsurprising given that it is a seismic change, that it extensively amended the Michigan Constitution, and that it concerns core areas of political expression. Simply because others could raise a similar challenge does not mean Plaintiffs' harms are generalized grievances; it means that the Amendment violates the rights of many. As in *Students* and *Miller*, the question is not how many people could state the same claim or feel the same way, but whether specifically *Plaintiffs* can show an injury in fact.

Defendant Benson has an injury-in-fact objection as well, but only as to Count IV (the claim regarding the Amendment's speech restrictions). She contends that because Plaintiffs are not—nor are they likely to be—Commissioners or Commission staff, the Amendment's speech restrictions do not affect their ability to engage in protected speech. (Lead Case, ECF No. 45, Def. Benson's Resp., PageID.656-657.)

This argument ignores Plaintiffs' claim that the Amendment's infringement on their constitutional rights is forward looking. Its more fatal flaw, however, is that it ignores the role of MRP, which clearly has standing. It is undisputed that four Commissioners will be MRP members or affiliates. Thus, MRP can assert Count IV through associational standing. Associational standing applies if the organization's "members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000). For the same reason stated above, MRP need not wait for its members' and affiliates' speech to be restricted to raise such claim. Even if only one plaintiff has standing to assert a claim for declaratory judgment, the court will rule on the claim. *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 299 n.11 (1979); *see also Sch. Dist. v. Sec'y of the United States Dep't of Educ.*, 584 F.3d 253,

261 (6th Cir. 2009) (same). Because MRP will eventually have members or affiliates serving on the Commission whose associational and speech interests are germane to MRP's purpose, it has standing to assert this claim, and the Court has jurisdiction to hear it.

B. This Court Can Redress the Amendment's Restrictions on Plaintiffs' Constitutional Rights

Defendant VNP also argues that Plaintiffs cannot show redressability because, even if the speech and association restrictions were removed, there is "minimal chance of being randomly selected" to serve on the Commission. (Lead Case, ECF No. 38, Br. in Support of VNP's Mot. to Dismiss, PageID.500.) Therefore, VNP argues, it is not "'likely' as opposed to purely 'speculative'" that a favorable decision here would achieve Plaintiffs' requested relief. *Id.*

This argument fails because it ignores Plaintiffs' requested relief. As stated above, redressability is "a likelihood that the requested relief will redress the alleged injury." To decide that question, it is crucial that the requested relief and injury be clearly defined. Plaintiffs argue that certain provisions of the Amendment violate their freedoms of speech and association and their equal protection rights by requiring them to choose between those rights and Commissioner eligibility. Plaintiffs are asking the Court to declare those provisions unconstitutional. Because those provisions are not severable from the rest of the Amendment,[15] Plaintiffs are seeking a

[15] The challenged provisions are inextricably intertwined with the remainder of the Amendment and cannot be severed, which is the reason Plaintiffs have requested the broad injunctive relief. *See Hill v. Wallace*, 259 U.S. 44, 70 (1922) ("[The severability clause] did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court."); *Averett v. United States HHS*, 306 F. Supp. 3d 1005, 1022 (M.D. Tenn. 2018) (holding an invalid provision of a rule not severable because its provisions were intertwined); *King Enters. v. Thomas Twp.*, 215 F. Supp. 2d 891, 918 (E.D. Mich. 2002) (holding provisions of an ordinance invalid because its provisions were "inextricabl[y] intertwined"); *In re Apportionment of State Legislature-1982*, 413 Mich. 96, 138, 321 N.W.2d 565 (1982) (holding that "inextricably related" provisions were non-severable).

declaration that the entire Amendment is unconstitutional: "Wherefore, Plaintiffs respectfully request that the Court enter an Order (a) declaring the [Amendment] unconstitutional under the First and Fourteenth Amendments to the United States Constitution." (Member Case, ECF 1, the Complaint, PageID.24.) In short, Plaintiffs' injuries are caused by the Amendment, and their requested relief is that the Court declare the Amendment unconstitutional. Holding for Plaintiffs is not just likely to redress the harm—it is certain.

Further, even if the Court holds that the Amendment's offending provisions are severable, Plaintiffs still have standing. Redressability in this context means giving Plaintiffs an equal opportunity to apply for service on the Commission—not that they will be guaranteed a position on the Commission, as Defendant VNP wrongly contends. (Lead Case, ECF No. 36, Def. VNP's Resp., PageID.453.) Plaintiffs' final prayer for relief is for "such other and further relief as the Court deems equitable and just." (Member Case, ECF 1, the Complaint, PageID.25.) That prayer allows for the equitable, flexible remedy Plaintiffs are seeking in the event the Court finds the offending provisions severable.

Defendant VNP also contends that, although Plaintiffs "have asserted in passing that they wish to serve on the new Commission, . . . the sincerity of that claim seems doubtful in light of the relief that they seek, which would prevent any implementation or use of that Commission." (Lead Case, ECF No. 38, Br. in Support of VNP's Mot. to Dismiss, PageID.500.) The argument appears to be that Plaintiffs cannot truly wish to be on a Commission they believe is unconstitutional. But desires are not always so binary; these are merely desires in the alternative. As outlined above, Plaintiffs' primary request is that the Court declare the Amendment unconstitutional. Alternatively, if the Amendment is not declared unconstitutional, Plaintiffs desire to have an equal opportunity to serve on the Commission.

Because Plaintiffs satisfy all three elements of the standing test, the Court has jurisdiction to hear their claims.

V. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE DOCTRINE OF LACHES

Defendant claims that Plaintiffs unduly delayed in the filing of this action and, therefore, that Plaintiffs' claims are barred by laches. (Lead Case, ECF No. 45, Def. Benson's Resp., PageID.665-669.) As an initial matter, the Amendment was not adopted until late 2018 upon certification of the November general election results, and Plaintiffs brought this action in the summer of 2019 to enjoin implementation of the Amendment—mere months after its adoption and prior to the first implementation deadline. Plaintiffs did not unreasonably delay in bringing this action, and in any event, the doctrine of laches does not bar Plaintiffs' constitutional claims as a matter of law.

Laches is inapplicable to these constitutional claims because Plaintiffs continue to suffer ongoing harm due to Defendant Benson's implementation of the Amendment. Laches does not apply to ongoing constitutional violations because while "laches stems from prejudice to the defendant occasioned by the plaintiff's past delay . . . almost by definition, the plaintiff's past dilatoriness is unrelated to a defendant's ongoing behavior that threatens future harm." *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 959-60 (9th Cir. 2001). Moreover, the Sixth Circuit has held that laches is not a viable defense in claims seeking injunctive or declaratory relief. *See Kellogg Co. v. Exxon Corp.*, 209 F.3d 562, 568 (6th Cir. 2000) (holding that the doctrine of laches "does not bar injunctive relief"). "Laches only bars damages that occurred before the filing date of the lawsuit." *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 412 (6th Cir. 2002) (internal citation omitted). "A law that works an ongoing violation of constitutional rights does not become immunized from legal challenge" simply because it has not been immediately challenged. *Kuhnle Bros., Inc. v. Cty. of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997).

As a matter of law, the doctrine of laches does not bar Plaintiffs' claims. As previously described, continued implementation of the Amendment will violate Plaintiffs' constitutional rights under the First Amendment and Fourteenth Amendment, and Plaintiffs are seeking only declaratory and injunctive relief. Thus, the nature of the ongoing constitution violation and the relief sought renders a laches defense inapplicable here.

CONCLUSION

For the reasons articulated in this Brief and in the Brief in Support of Plaintiffs' Motion for Preliminary Injunction, Plaintiffs have sufficiently stated claims upon which relief can be granted and are likely to prevail on the merits of their claims.

Wherefore, Plaintiffs respectfully request that the Court enter an Order (a) denying Defendant's Motion to Dismiss and (b) granting Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted,

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