UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY DAUNT, *et al.*,

Plaintiffs,

v.

JOCELYN BENSON, in her official Capacity as Michigan Secretary of State,

Defendant,

and

COUNT MI VOTE d/b/a VOTERS NOT POLITICIANS,

Intervenor-Defendant.

MICHIGAN REPUBLICAN PARTY, *et al.*

Plaintiffs,

v.

JOCELYN BENSON, in her official Capacity as Michigan Secretary of State,

Defendant,

and

COUNT MI VOTE d/b/a VOTERS NOT POLITICIANS,

Intervenor-Defendant.

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

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

HON. JANET T. NEFF

PLAINTIFFS' CONSOLIDATED MEMORANDUM IN OPPOSITION TO DEFENDANT BENSON'S MOTION TO DISMISS AND INTERVENOR-DEFENDANT VOTERS NOT POLITICIAN'S MOTION TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS, AND REPLY TO THEIR OPPOSITIONS TO A PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs are suffering a concrete, particularized, and imminent injury by virtue of the Michigan Constitution's exclusion of Plaintiffs from serving as Commissioners based on who they are and with whom they associate and are related. Accordingly, the Court should deny the Motions to Dismiss filed by Defendant Benson ("Defendant") and Intervenor-Defendant Count MI Vote, d/b/a Voters Not Politician's ("VNP," and collectively with Benson, "Defendants"), and the Court should grant Plaintiffs' Motion for Preliminary Injunction.

ARGUMENT

I. THE COURT SHOULD DENY DEFENDANT'S MOTION TO DISMISS AND VNP'S MOTION FOR JUDGMENT ON THE PLEADINGS.

A. Plaintiffs Have Standing.

VNP argues that "Plaintiffs lack Article III standing to raise the constitutional challenges asserted in this case because those challenges assert generalized grievances and the relief that they have requested will not serve to remedy the injury that they have alleged." Lead Case, ECF No. 33, VNP Mot. to Dismiss, PageID.387. VNP is wrong.

When analyzing a challenge to subject matter jurisdiction under Rule 12(b)(1), the Court must accept the sufficiency of the allegations as true. Fed. R. Civ. P. 12(b)(1). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 561 (1992) (internal citations and quotations omitted).

Plaintiffs need only satisfy three requirements to establish standing:

> First, the plaintiff must have suffered an injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61 (emphasis added). To show an "injury in fact," Plaintiffs must allege "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent." *Lujan*, 504 U.S. at 560 (cleaned up). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561.

Plaintiffs easily satisfy these three requirements. First, Plaintiffs' "injury in fact" is well established by the Complaint, and there is no dispute that that the alleged injury was caused by Defendant. Plaintiffs are each individuals who fall into one or more of the eight prohibited categories of persons set forth in Article IV, Section 6(1)(B) and (C) of Michigan's Constitution and therefore are categorically excluded from eligibility to serve on the Commission on the basis of their participation in activities that are constitutionally protected. Lead Case, ECF No. 1, Compl., PageID.5-8, 18; Lead Case; ECF No. 4, Mot. for Prelim. Inj., PageID.72-74. By excluding Plaintiffs from eligibility based on their prior exercise of constitutionally protected activity, Defendant has placed a substantial burden on Plaintiffs' Constitutional rights and denied them equal treatment resulting

from the imposition of the barrier. *Autor v. Blank*, 892 F.Supp.2d 264, 273 (D.D.C 2012) (citing *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003)), *rev'd* on other grounds, 740 F.3d 176 (D.C. Cir. 2014); *Speech First, Inc. v. Schlissel*, 2019 Fed. App. 0249P (6th Cir. 2019) (citing *Laird v. Tatum*, 408 U.S. 1, 11 (1971)) ("Governmental activity constitutes injury-in-fact when 'the challenged exercise of governmental power [is] regulatory, proscriptive, or compulsory in nature, and the complainant [is] either presently or prospectively subject to the regulations, proscriptions, or compulsions that he [is] challenging.'"). This is a direct and personal injury, not the type of undifferentiated injury asserted by Plaintiffs in *Gill*. *See Gill v. Whitford*, 585 U.S. ___, 138 S.Ct. 1916, 1920-22 (2018). Tellingly, Defendants do not address or even cite to the opinion in *Autor*, which illustrates exactly how those denied opportunities to serve on government bodies because of prior exercise of First Amendment rights set forth a cognizable constitutional claim. *See Autor*, 892 F.Supp.2d at 271-73.

Further, not only are Plaintiffs currently banned from Commission eligibility, they must also face the choice of continuing to exercise their First Amendment rights and participate in the political process or forgo that protected participation to someday gain eligibility. Lead Case, ECF No. 4, Mot. for Prelim. Inj., PageID.87. Forcing Plaintiffs to make such a choice is, on its own, an adequate basis for standing. *Meese v. Keene,* 481 U.S. 465, 475 ("the [LDA] 'puts the plaintiff[s] to the Hobson's choice of foregoing'" exercise of their First Amendment rights or incurring the injury of ineligibility. This forced choice alone creates standing."); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 739 (2008) ("The

resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice."). *See also McGlone v. Bell*, 681 F.3d 718 (6th Cir. 2012) (citing *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994)(internal citation omitted)("[i]t is well-settled that a chilling effect on one's constitutional rights constitutes a present injury in fact."). Such a forced choice "affect[s] the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. Thus, Plaintiff's injuries are not only "concrete," but "particularized." And because this injury is "personal to [them], it is not a generalized grievance.". *McGlone*, 681 F.3d at 729.

Second, Plaintiffs' injuries would clearly be redressed by a decision providing the requested injunctive relief or by the invalidation of the Commission in its entirety. In *Lujan*, the Supreme Court acknowledged the ease with which a Plaintiff can show redress of grievances, explaining, "[w]hen the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgement stage) or proved (at the trial stage) in order to establish standing depend considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan,* 504 U.S. at 561-62.

VNP argues that Plaintiffs are seeking a remedy for a "generalized grievance shared by everyone who voted 'no' on Proposal 18-2," and therefore, they cannot establish standing based on this grievance. Lead Case, ECF No. 38, VNP Br. in Support

of Mot. Dismiss, PageID.499-500. Not so. Not every individual who voted against the passage of Proposal 18-2 suffers the injuries Plaintiffs alleged. Quite the opposite, the group of individuals whose Constitutional rights are injured in the manner alleged in the Complaint is limited to those who are *excluded* from eligibility to serve on the Commission because of a prior exercise of a First Amendment right. The Court should reject VNP's assertion that Plaintiffs must forgo participating in otherwise constitutionally protected activity for the six years leading up to the 2030 redistricting to be eligible for the next Commission.

Third, it is not just likely but certain that Plaintiffs' injury will be redressed by a favorable decision. Whether this Court strikes the prohibited categories of persons or the Commission as a whole, Plaintiffs will no longer be suffering a constitutional injury. VNP says that Plaintiffs have a minimal chance of being selected on the Commission, so any order's effect on them is entirely "speculative." *Id.* at 500. But Plaintiffs do not allege that their injury is a failure to obtain a Commissioner position; they allege they are injured by being excluded from eligibility and forced to choose between eligibility and engaging in constitutionally protected activities. *See supra* at 4. This is not dissimilar from the Plaintiffs in *Autor*, who similarly were not guaranteed to be chosen to serve on an International Trade Advisory Committee.

B. Plaintiffs Have Adequately Pled Violations of The First Amendment.

1. Legal Standards

When analyzing a Rule 12(b)(6) motion, the Court must "construe the complaint in

the light most favorable to the plaintiff[s], accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff[s]." *Bickerstaff v. Lucarelli*, 830 F.3d 388, 396 (6th Cir. 2016) (quoting *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). The same is true for motions for judgment on the pleadings under rule 12(c). *McGlone v. Bell,* 2012 Fed. App. 0435N (6th Cir. 2012) (citing *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 295 (6th Cir. 2008) (internal citation omitted) (citing *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007)) (internal citations and quotations omitted). A motion to dismiss for failure to state a claim is disfavored, especially when one's civil rights are at stake. *Id.* (citation omitted); *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976).

2. Plaintiffs' Claims are Based on their Exclusion from Commission Eligibility Because They Participated in Constitutionally Protected Activities.

As set forth in the Complaint, the essence of Plaintiffs' constitutional claims is that the eligibility requirement excludes citizens from serving for engaging in constitutionally protected activity or even being related to someone who has engaged in such activity. Lead Case, ECF No. 1, Compl., PageID.21. Plaintiffs have sufficiently alleged their protected constitutional rights, and the unconstitutional burdens that the Commission selection process has placed on those rights by rendering Plaintiffs ineligible to apply. Plaintiffs' prior filings have set forth the well-founded constitutional principles that support their claims, and Plaintiffs will not repeat them here. Suffice it to say Plaintiffs have adequately alleged their claims.

"For at least a quarter-century, the [Supreme] Court has made clear that, even though a person has no 'right' to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons, *there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech*. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible." *Rutan v. Repub. Party*, 497 U.S. 62, 86 (1990) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) and *Speiser v. Randall,* 357 U.S. 513, 526 (1957)).

These principles were reiterated more recently by the D.C. Circuit in *Autor*, a case that is remarkably like this one yet conspicuously absent from Defendants' filings. *Autor v. Pritzker*, 740 F.3d 176 (D.C. Cir. 2014). In *Autor*, federally registered lobbyists challenged the constitutionality of the President's decision to ban lobbyists from serving on advisory committees. *Id.* The D.C. Circuit, citing the same *Sindermann* line of cases Plaintiffs rely on here, reversed the district court's dismissal of the claim. The Court's reversal rested on the conclusion that the lobbyists pled a viable First Amendment unconstitutional-conditions claim by alleging that the government conditioned their eligibility for the valuable benefit of committee membership on their willingness to limit

their First Amendment right to petition government. *Id.* at 184. *Autor* applies equally here.

3. VNP Fails to Distinguish Between Plaintiffs' Constitutional Rights and the Burdens Placed on Those Rights by Defendant.

VNP argues that Plaintiffs have no First Amendment interest in Commission membership. Lead Case, ECF No. 32, VNP Br. Opp. Prelim Inj., PageID.361. But VNP misunderstands the alleged constitutional right. Plaintiffs have a First Amendment interest *in the constitutionally protected activities* used as a basis to disqualify Plaintiffs from Commission eligibility. VNP seems to be implicitly arguing that the *burden* placed on Plaintiffs' constitutional rights of free speech and association (i.e., disqualification from eligibility) must, by itself, separately constitute a constitutional violation. This is wrong under well-settled Supreme Court precedent.

The "'unconstitutional conditions' doctrine holds that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech *even if he has no entitlement to that benefit*." *Bd. of Cnty. Comm'rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 674 (1996) (emphasis added). For instance, while there is no constitutional right to government employment, the government cannot condition employment on the relinquishment of constitutional rights. *E.g.*, *Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right.'"); *Connick v. Myers*, 461 U.S. 138, 142 (1983) ("[I]t has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest

in freedom of expression."); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 606 (1967) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon [government employment]."") (cleaned up). So, Plaintiffs must establish that eligibility for Commission membership would otherwise be available to them but for their exercise of constitutionally protected rights, *not* that there is a distinct constitutional right to Commission membership.

4. VNP's Application of *Carrigan's* Conflict of Interest Analysis is Misplaced.

Defendants both say that this is a "conflict of interest" case, not an unconstitutional-conditions case. Not so. A conflict of interest occurs where an individual is prevented from voting on a particular matter; the facts here involve disqualification from certain individuals serving on the Commission at all. The distinction is material because it is the outright ban on eligibility that prevents Plaintiffs from being fairly allowed to apply for the valuable benefits that accompany government positions like those on the Commission.

VNP relies heavily on *Nevada Comm. on Ethics v. Carrigan*, 564 U.S. 117 (2011), to argue that there can be no First Amendment claim in a conflict of interest situation. But *Carrigan* is inapplicable and distinguishable. There, the Supreme Court reversed the Nevada Supreme Court's invalidation of a recusal provision of the State's Ethics in Government law as unconstitutionally overbroad in violation of the First Amendment. *Carrigan,* 564 U.S. at 119. While the Court recognized that the First Amendment prohibits laws that abridge the freedom of speech, the Court held that "the Amendment has no application when what is restricted is not protected speech." *Id.* at 121. Restrictions on legislators'

voting are not restrictions on their protected speech because "… a legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it." *Id.* at 125. This was *not* a case where the individual at issue was prohibited from running for city council because a person with whom he has a relationship might have business before the city council.

Carrigan is inapplicable here. That decision rested on the Court's conclusion that a legislator's power is not a personal right; it belongs to the people. In contrast here, the ability to apply to the Commission belongs to the individual Plaintiffs. Only if Plaintiffs were first allowed to apply for and were then selected to participate on the Commission would particular "conflict of interest" principles come into play. *Carrigan* has no relevance here.

In addition, Proposition 18-2 addresses potential conflicts of interest by prohibiting those who serve on the Commission from running for office under the maps they voted to adopt. Mich. Const. art. IV, § 6 (". . . for five years after the date of appointment, a commissioner [would be] ineligible to hold a partisan elective office at the state, county, city, village, or township level in Michigan.") This is not dissimilar from, for example, the federal prohibition on post-employment lobbying the federal government on matters in which the employee was personally and substantially involved while employed by the federal government. *See* 18 U.S.C. § 207; Exec. Order No. 13,770, 82 FR 9333 (2017).

5. The Michigan Constitutional Provision Excluding Plaintiffs from Eligibility to Serve on the Commission Is Not Narrowly Tailored.

Defendants explains that the exclusionary categories were designed to remove from the redistricting process, individuals who could "reasonably be perceived as having a private interest in the outcome of any redistricting plan approved by the Commission." Lead Case, ECF No. 39, Def. Opp. to Prelim. Inj., PageID.552; Lead Case, ECF No. 32, VNP Br. Opp. to Prelim. Inj., PageID.373. The categories are essentially based on the individual having engaged in activities that reach a certain level of partisanship. In short, the State draws an arbitrary line between certain levels of partisan activity – while some levels of partisan activity are deemed exclusionary (for example, self-identifying as a Democrat or a Republican), others are not (such as serving as a volunteer, unpaid precinct committee member for a recognized party).[1] Embedded in this arbitrary line drawing is the erroneous assumption that it is only elected officials, candidates, people who have been engaged in other political activities or lobbying, and those somehow tied to them (by family relationships), who have a "personal" or "private" interest in redistricting. These categories are both under- and over- inclusive, regardless of whether the exclusions are designed to eliminate partisanship or private interests. The result is that the exclusionary categories are

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

not narrowly tailored to the government's interest. *Vickery v. Jones,* 856 F. Supp. 1313 at 1322 (S.D. Ill. 1994); *see also* Lead Case, ECF No. 4, Mot. Prelim. Inj., PageID.77.

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

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

Similarly, the Secretary of State has explained in draft guidance that while paid

employees of an elected official, political candidate, campaign, or political action committee are excluded form eligibility, volunteers may be eligible to serve on the Commission. *See* Lead Case, ECF No. 1-2, Compl. App.B, PageID.40-49 (Draft Commissioner Eligibility Guidelines). Yet an unpaid volunteer may be more likely than a disqualified paid consultant to seek employment from a successful candidate. And those same guidelines state that any individual serving as a paid consultant or employee of a *non-partisan* elected official, non-partisan political candidate or *non-partisan* local political candidate's campaign since August 15, 2014, may not be eligible to serve on the Commission. *Id.* Further, although Supreme Court Justices in Michigan are nominated by political parties in an inherently partisan process, current Justices (and those who have served on the Supreme Court in the last six years) are *not* excluded from eligibility to serve on the Commission, yet the State provides no explanation for the inconsistent treatment between these judges and other elected officials. *Id.* Also bafflingly inconsistent is that township candidates who serve in partisan positions are disqualified but "nonpartisan" city candidates are not. So, a member of the Detroit City Council may serve (even when supported and endorsed by the Democratic Party) while a Republican trustee of Macomb Township may not serve.

Perhaps the most startling example of over-inclusiveness is the exclusion of any parent, stepparent, child, stepchild or spouse of any individual that falls into one of the other excluded categories. There is no basis here to disqualify family members as they bear no relationship to the state's purported interest in eliminating individuals who have

engaged in the state political process from redistricting decisions. Indeed, the Michigan Attorney General found unconstitutional a statute that prohibited political contributions by family members (including spouses, parents, children, or spouses of a child) of individuals with interest in a casino enterprise. Mich. Att'y Gen. Adv. Op. 7002 (1998). The Attorney General concluded that the family members "bear no relationship to th[e] state's compelling interest." *Id.; see also* SEC Rule 206(4)-5, 17 C.F.R. 275 (2010) (excluding spouses from "pay to play" rule prohibiting investment advisors making contributions to government officials that influence government entities to whom they provide services). However the State defines its interest, it cannot be soundly argued that a familial relationship is enough to justify the denial of their constitutional rights. And these are but a few examples of the scheme's constitutional shortcomings.

By excluding certain categories of citizens from eligibility based on their exercise of core First Amendment rights, including freedom of speech, right of association, and right to petition the government, and failing to narrowly tailor the constitutional provisions to a compelling interest, the State has violated the First Amendment by unconstitutionally conditioning eligibility for a valuable benefit on Plaintiffs' willingness to limit their First Amendment rights.

C. Plaintiffs Have Adequately Pled Violations of The Fourteenth Amendment.

The end result of the over- and under- inclusiveness of the excluded categories discussed above is a stark and inappropriate disparity in treatment between the Plaintiffs

and those who are eligible to serve on the Commission. As discussed in Plaintiffs' previous filings, and by the Michigan Republican Party in its response to the motions to dismiss in the consolidated matter (herein incorporated by reference), the exclusionary factors also violate the Equal Protection Clause because they burden only individuals that fall into set categories because of an exercise of First Amendment rights that may indicate an interest in the outcome of redistricting, while imposing no restriction on individuals who may be just as personally or privately invested in the outcome. *See* Lead Case, ECF No. 1, Compl., PageID.21, 29-31; Lead Case, ECF No. 4, Mot. for Prelim. Inj., PageID.86-88; *see also* Griffin, *et al. v. Padilla*, No. 2:19-cv-01506, slip op. at 20 (E.D. Ca. Oct. 10, 2019)(granting preliminary injunction because, *inter alia*, State unlikely to succeed in showing that the differing burdens imposed by state law requiring major party candidates to disclose tax return in primary but exempting independent candidates are constitutional under the Equal Protection clause).

Nor can the exclusions be justified as a way to transfer power "from the legislature . . . to the hands of citizens without a personal stake" in redistricting as Defendant argues because there are numerous less restrictive means available to accomplish that purported interest. Lead Case, ECF No. 45, Def. Resp., PageID.663-664. For example, by excluding only family members who are financially dependent on an individual that falls into one of the other excluded categories or family members of public officials and party leaders who are currently serving. Instead, it was drafted in such a manner to be both overinclusive and

underinclusive in operation, rendering it unconstitutional under the Equal Protection Clause.

D. Plaintiffs' Claims Are Not Barred By Laches.

Defendants argues that Plaintiffs' claims are barred by laches. Lead Case, ECF No. 43, Def. Br. in Support Mot. to Dismiss, PageID.604-608; Lead Case, ECF No. 32, VNP Br. Opp. Prelim. Inj., PageID.380. Specifically, Defendants say that Plaintiffs' filing of this lawsuit only seven months after voters adopted the amendment to Michigan's Constitution somehow constitutes unreasonable delay which prejudices the Defendant. Lead Case, ECF No. 43, Def. Br. in Support Mot. to Dismiss, PageID.605. That is incorrect.

"Where a plaintiff seeks solely equitable relief, his action may be barred by the equitable defense of laches [only] if (1) the plaintiff delayed unreasonably in asserting his rights and (2) the defendant was prejudiced by this delay." *Am. Civil Liberties Union of Ohio, Inc. v. Taft*, 385 F.3d 641, 647 (6th Cir. 2004) (citing *Brown-Graves Co. v. Cent. States, Se. and Sw. Areas Pension Fund*, 206 F.3d 680, 684 (6th Cir. 2000)). Laches is the "'negligent and unintentional failure to protect one's rights.'" *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 408 (6th Cir. 2002) (quotation omitted).

Significantly, laches "only bars *damages* that occurred before the filing date of the lawsuit." *Id.* at 412 (cleaned up). "It does not prevent plaintiff[s] from obtaining injunctive relief or post-filing damages." *Id.*; *accord Kellogg Co. v. Exxon Corp.*, 209 F.3d 562, 568 (6th Cir. 2000) (laches "does not bar injunctive relief") (citation omitted)). "Laches does not apply to ongoing or recurring harms because while '[l]aches 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.'" *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019) (three-judge panel) (alteration in original) (quoting *Danjaq LLC v. Sony Corp.,* 263 F.3d 942, at 959-60 (9th Cir. 2001) (citing *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 799 (4th Cir. 2001)). *Accord Kuhnle Bros., Inc. v. Cty. of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997) ("a law that works an ongoing violation of constitutional rights does not become immunized from legal challenge" merely because the plaintiff failed to sue within the applicable statute of limitations); *France Mfg. Co. v. Jefferson Elec. Co.*, 106 F.2d 605, 609 (6th Cir. 1939) (same).

1. Laches Does Not Apply To Plaintiffs' Claims As A Matter Of Law.

Plaintiffs expressly seek injunctive relief against ongoing and recurring harm. Lead Case, ECF No. 1, Compl., PageID.1 (Title: "Complaint for declaratory and injunctive relief"); *id.* at 30-31 ("For all these reasons, the Plaintiffs *have been and will continue to be* deprived unconstitutionally of the equal protection of the law.") (emphasis added); Lead Case, ECF No. 4, Mot. Prelim. Inj., PageID.87 ("Plaintiffs are already being excluded from eligibility based on their exercise of constitutionally protected activity.") Accordingly, Plaintiffs are very clearly seeking injunctive relief, to which the doctrine of laches is not applicable, as just discussed.

Tellingly, two recent three-judge district court panels in the Sixth Circuit held that laches did not apply to partisan gerrymandering despite the passage of more than half a

decade and numerous election cycles. *League of Women Voters of Mich.*, 373 F. Supp. 3d 867 (suit filed over six years after redistricting completed and after three election cycles held under new map); *Ohio A. Philip Randolph Inst. v. Smith*, 335 F. Supp. 3d 988, 1002 (S.D. Ohio 2018) (three-judge panel) (complaint filed nine years after redistricting completed and six years after first election under new map).[2] These three-judge panels went so far as to find that as a matter of law laches does not bar partisan gerrymandering claims generally because they involve claims for declaratory and injunctive relief. *League of Women Voters of Mich.*, 373 F. Supp. 3d at 909; *Smith*, 335 F. Supp. 3d at 1002. Because those plaintiffs were not "seeking a remedy for any harm that they alleged occurred prior to the filing of their lawsuit, but seek prospective relief only," their claims were not barred by laches. *Smith*, 335 F. Supp. 3d at 1002 (citing *Nartron Corp.*, 305 F.3d at 412). So too here.

2. Moreover, Plaintiffs Have Not Unreasonably Delayed Or Prejudiced Defendant.

What's more, Plaintiffs did not unreasonably delay in asserting their rights, and Defendant does not suffer any prejudice from the alleged delay. First, Plaintiffs did not unreasonably delay because, in addition to preparing for suit and gathering the appropriate record needed to sue, the landscape of the Commission has been developing. For example, since the adoption of the Commission by voters, Defendant has posted informational materials and resources regarding the independent citizens redistricting commission on the official Department of State website and on RedistrictingMichigan.org, including a

[2] While these cases predate the United States Supreme Court's decision in *Rucho v. Common Cause*, 139 S. Ct. 2482 (2019) (holding that partisan gerrymandering claims present political questions beyond the reach of the federal courts), nothing in *Rucho* works against the laches rationale in those cases.

"citizen's guide" and "timeline," as well as a form for interested individuals to complete in order to receive a commissioner application when it becomes available. Lead Case, ECF No. 4, Mot. Prelim. Inj., PageID.66; Michigan.gov, *Citizen Guide,* https://www.michigan.gov/sos/0,4670,7-127-1633_91141---,00.html. Defendant also posted for public comment a draft application and eligibility guidelines. *See generally id.*; Michigan.gov, *Citizen Guide,* https://www.michigan.gov/sos/0,4670,7-127-1633_91141---,00.html.. The draft eligibility guidelines interpret the disqualifying criteria to extend, for example, to individuals who have declared candidacy for or been elected to the position of precinct delegate. This information was not expressly laid out in the amendment adopted by voters. Accordingly, it was both prudent and reasonable, especially from a judicial economy standpoint, for Plaintiffs to bring this suit when they did. Doing elsewise would have necessitated potentially amending complaints or bringing an unripe suit. This alleged delay was in no way unreasonable or nefarious.

Second, Defendant has not demonstrated that she will suffer prejudice because of any alleged delay. Defendant likens this case to ballot-access cases like *Kay v. Austin*, 621 F.2d 809 (6th Cir. 1980). But in *Kay*, the candidate waited to sue until ballots had already been printed at a cost of hundreds of thousands of dollars. *Id.* at 813. In contrast here, any steps Defendant has taken to prepare for the application and selection of Commission members can continue with the inclusion of those who would otherwise have been excluded in the absence of this suit. Assuming the Commission survives this suit, Defendant would just continue the application process with the people excluded in

violation of the Constitution being included. Lead Case, ECF No. 39-1, Marsh Aff., PageID.578 (setting forth June 1, 2020 application deadline and September 1, 2020 deadline for commissioner selection). In fact, VNP itself asserts "the earliest that Plaintiffs' rights might be impacted, if at all, is June 1, 2020." Lead Case, ECF No. 32, VNP Br. Opp. Prelim. Inj., PageID.379.

Indeed, the only "prejudice" the Defendants seems to argue is that this suit might somehow interfere with the Commission's establishment. But "[n]either the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *ACLU v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir. 2003). There can be no "prejudice" to Defendant where she has unconstitutionally excluded individuals for eligibility.

F. The Severability Clause In Article IV Section 20 Does Not Preclude the Invalidation of Proposal 18-2 In Its Entirety.

VNP argues that the severability clause in Article IV, § 6 (20) precludes this Court from invalidating the entire Commission. But notwithstanding a severability clause, this Court must still determine whether the offending provisions of a law may be severed or, if doing so would upset the will of the enactors. *In re request for Advisory Op. Regarding Constitutionality of 2011 PA 38*, 490 Mich. 295, 346 (Mich. 2011); *People v McMurchy*, 249 Mich. 147, 158 (Mich. 1930); Mich. Att'y Gen. Op. No. 7309 (2019). As explained below, the unconstitutional portions of the enactment creating the Commission are not severable.

The exclusionary factors play an essential role in accomplishing the goal that the Commission was designed to achieve (and in VNP's campaign to persuade voters to

adopt Proposal 18-2), and therefore so interwoven with the other provisions, it cannot be presumed that voters would have intended the Commission to exist without those provisions. *See Garcia v. Wyeth-Ayerst Labs*, 385 F.3d 961, 967 (6th Cir. 2004). The State explains that the "people of Michigan" created the Commission to "combat the effects of 'excessive partisanship'" and "[t]he composition and selection of its members was designed to eliminate undue political influence in the drawing of district lines" and it "does so by rendering ineligible to serve on the Commission." Lead Case, ECF No. 39, Def. Opp. Prelim. Inj., PageID.532-533. Thus, by Defendant's own admission, the exclusionary factors are essential to the intended functioning of the Commission.

In determining the will of the voters, courts are careful not to usurp the decision of the voters by inserting their own view on whether voters would have voted differently without the provisions deemed to be unconstitutional. *See In re Apportionment of State Legislature-1982*, 321 N.W.2d 565 (Mich. 1982) (Michigan Supreme Court held that entire redistricting commission was inseparable from specific standards founds to be unconstitutional because holding otherwise would have required the court to opine on whether the people would have voted for the commission without the standards subsequently found to be unconstitutional and that decision properly belonged to the people of Michigan and *not* to the court); *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964). *See also* Lead Case, ECF No. 4, Mot. Prelim. Inj., PageID.81-85. As the court noted in *In re*, no one "can . . . predict what the voters would do if presented with the severability question at a general election . . . . The people may prefer to have the matter returned to

the political process or they may prefer plans drawn pursuant to the guidelines which are delineated in this opinion." *In re,* 413 Mich. at 137.

Further, the wording of ballot proposal specifically stated that the proposed amendment would "[p]rohibit partisan officeholders and candidates, their employees, certain relatives, and lobbyists from serving as commissioners" and the language of the accompanying draft amendments provided specific details of the exact categories of individuals that would be ineligible to serve on the Commission. Michigan Board of State Canvassers, *Official Ballot Wording approved by the Board of State Canvassers August 30, 2018 Voters Not Politicians* (2019), https://www.michigan.gov/documents/sos/Official_Ballot_Wording_Prop_18-2_632052_7.pdf. Thus, the voters were aware of the specific categories of individuals that were deemed to be "too partisan" in nature, and thus excluded from eligibility in order to accomplish the stated objective of "prohibit[ing] partisan[s] . . . from serving as commissioners." This supports the conclusion that the voters, when they supported the ballot proposal, believed that such restrictions were an essential part of the Commission, and are thus not severable. However, to the extent that there is not enough information to draw conclusions about voter intent, the exclusionary provisions are not properly severable.

II. THE COURT SHOULD GRANT PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION.

A. Plaintiffs Satisfy the Preliminary Injunction Factors.

1. Plaintiffs Are Likely To Succeed On The Merits Of Their Claims.

Defendants argue that Plaintiffs are unlikely to succeed on their First Amendment claim because the State's interests outweigh the infringement of Plaintiffs' fundamental rights to political speech and association. Lead Case, ECF No. 39, Def. Opp. Prelim. Inj., PageID.547-563; Lead Case, ECF No. 32, VNP Br. Opp. Prelim. Inj., PageID.359-374. As discussed above, and in the Motion for Preliminary Injunction, the Commission scheme causes, and will continue to harm Plaintiffs in violation of the First and Fourteenth Amendments. Plaintiffs' harms are far from minimal, and the State's purported interest in furthering such a scheme in no way outweighs those harms. *See supra* Sections I(B) and (C); Lead Case, ECF No. 4, Mot. Prelim. Inj., PageID.73-81.

VNP relies heavily on *Citizens for Legislative Choice v. Miller*, 144 F.3d 916 (6th Cir. 1998), to claim that Michigan has a constitutional right to structure its government. Lead Case, ECF No. 32, VNP Br. Opp. Prelim. Inj., PageID.359-360. There, the Sixth Circuit upheld term limits for state legislators, holding that term limits do not deprive citizens of the right to vote for the candidate of their choice. *Miller*, 144 F.3d at 921-23. *Miller* did not involve a challenge by candidates who Michigan law deemed ineligible for office. And the practices at issue here concern the denial of qualifications for public office based on participation in protected First and Fourteenth Amendment activity. Further, the portions of the scheme at issue here do not concern the eligibility of former Commission members to again serve on the commission, but rather concern the eligibility of people who have done nothing except engage in protected First Amendment activity. *Miller* is inapposite. If

Miller were relevant to this case, the plaintiffs in *Miller* would have been prohibited from running for state legislative office because they had a family member who was a legislator, or they were previously registered as a lobbyist, or they were an unsuccessful candidate previously. Accordingly, relying on jurisprudence upholding term limits has no relevance to the denial of eligibility based upon engaging in protected First Amendment activity.

Second, Defendant and VNP argue that Plaintiffs are unlikely to succeed on their Fourteenth Amendment claim because the Commission's exclusionary categories survive the lowest level of scrutiny, since those excluded from participation on the commission do not include a protected class. Lead Case, ECF No. 39, Def. Opp. Prelim. Inj., PageID.563-569; Lead Case, ECF No. 32, VNP Br. Opp. Prelim. Inj., PageID.374-375. As discussed above and in prior briefing, the exclusionary provisions of the law can survive only if the government can demonstrate that such laws further a vital government interest and are narrowly tailored to achieve that governmental interest. Lead Case, ECF No. 4, Mot. Prelim. Inj., PageID.75; *supra* at 11. Defendants do not even attempt to demonstrate that the State's interest in excluding Plaintiffs and those similarly situated to them is vital.

This leads to another problem for Defendants: neither sufficiently addresses why the Commission's exclusions are drawn where they are drawn. For example, Defendant states that "the objectives of the amendment are to create a decision-making body that is independent of the partisan political structure of the state's political parties and special interests." Lead Case, ECF No. 39, Def. Opp. Prelim. Inj., PageID.567. Yet, the Commission is not a non-partisan commission; it is a bipartisan commission. If the true

mission of the Commission was to cleanse partisanship or politics completely from the redistricting process, it could have been designed to do so. The current scheme draws arbitrary lines for when partisanship becomes too much while ignoring that someone excluded may hold the exact opposite partisan views of what Defendants assume (such as when an elected official affiliated with one party is married to someone affiliated with the other party).

Defendant and VNP also argue that Plaintiffs are unlikely to succeed on the merits of their claims because the unconstitutional provisions of the Commission are severable from the rest of the law. *Id.* at 572-573; Lead Case, ECF No. 32, VNP Br. Opp. Prelim. Inj., PageID.375-378. As discussed at length above, the unconstitutional portions of the Commission's scheme are fatal to the scheme as a whole. *See supra* at 21-23. Accordingly, this argument does not save the amendment.

2. Plaintiffs Will Continue To Suffer Irreparable Harm Absent A Preliminary Injunction, And Those Harms Will Become Worse**.**

Defendant says that Plaintiffs have not demonstrated any irreparable injury because there is no associational or expression-based exclusion of Plaintiffs viewpoints. Lead Case, ECF No. 39, Def. Opp. Prelim. Inj., PageID.573-574. But as explained above, in Plaintiffs' Preliminary Injunction Motion, and in the Complaint, Plaintiffs do and will continue to suffer injury because they are and will continue to be excluded from eligibility to participate in the Commission solely because they chose to exercise their First and Fourteenth Amendment rights. *See supra* at 3-6; Lead Case, ECF No. 4, Mot. Prelim. Inj., PageID.71-

74; Lead Case, ECF No. 1, Compl., PageID.18, 21. If they did not exercise their constitutionally protected rights, they would otherwise be eligible for the Commission. Plaintiffs must also make the choice of forgoing or continuing such speech and association in order to gain eligibility to participate in the Commission in the future. That is an injury.

Defendant next argues that exclusion from "state employment" is not an irreparable injury because Plaintiffs can simply receive the monetary compensation they might have received as Commission members at some later point. Lead Case, ECF No. 39, Def. Opp. Prelim. Inj., PageID.574. This point dodges Plaintiffs' argument that this scheme punishes Plaintiffs for their exercise of their First and Fourteenth Amendment rights. Lead Case, ECF No. 4, Mot. Prelim. Inj., PageID.86-87. The United States Supreme Court squarely addressed this circumstance in *Elrod*. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Supreme Court's Opinion, the Motion for Preliminary Injunction, and this brief directly address the issue. *See* Lead Case, ECF No. 4, Mot. Prelim. Inj., PageID.66-67, 73-81.

Further, as the Defendant acknowledges in her pleadings, she is already beginning preparations for the application process for which "the deadline for mailing applications looms." Lead Case, ECF No. 39, Def. Opp. Prelim. Inj., PageID.571-572; Lead Case, ECF No. 42, Def. Mot. Dismiss, PageID.594-595. When this process begins, Plaintiffs' harm will become even more irreparable, by removing any chance whatsoever of their serving on the Commission. In this way, Defendant's arguments conflict with both her own arguments and VNP's arguments that "the earliest that Plaintiffs' rights might be impacted, if at all, is June 1, 2020." Lead Case, ECF No. 32, VNP Br. Opp. Prelim. Inj., PageID.379; Lead Case,

ECF No. 39, Def. Opp. Prelim. Inj., PageID.575, 576 ("any delay in the process will effectively prevent the Secretary from completing the necessary tasks to meet the constitutionally-mandated January 1 deadline for mailing applications, and the ability to complete the random selection process for members of the Commission in time for them to complete their duties."). Defendant and Defendant-Intervenor want to have it both ways—they want to prevent the issuance of a preliminary injunction by arguing that Plaintiffs will not suffer any harm until mid-2020, and they also want to prevent the issuance of a preliminary injunction (and dismiss the case) by arguing that this case, and any injunction, will disrupt the "looming" application process and are therefore barred by laches or will cause irreparable harm to the State. *Id.* Plaintiffs are suffering, and will continue to, suffer irreparable harm by their exclusion from eligibility for the Commission. *See* Lead Case, ECF No. 4, Mot. Prelim. Inj., PageID.62-65 (discussing how Plaintiffs ongoing and future injury is well established in the Complaint and their previous filings). The Court should reject these inconsistent positions.

3. Granting An Injunction Will Not Cause Irreparable Harm To The State And Is In The Public Interest

Finally, Defendant and VNP argue that an injunction is not in the public interest because it could disrupt the Commission's operation. Lead Case, ECF No. 39, Def. Opp. Prelim. Inj., PageID.576; Lead Case, ECF No. 32, VNP Br. Opp. Prelim. Inj., PageID.380-381. In essence, Defendants are arguing that the remedy Plaintiffs are seeking in this case is the harm an injunction would impose. This is circular and conclusory.

Making Defendant and VNP's public interest argument even less convincing is the fact that the scheme deprives Plaintiffs and others of their rights guaranteed under the First and Fourteenth Amendments. The protection of constitutional rights is of the highest public interest. *Elrod*, 427 U.S. at 373; *See also United States v. Raine*s, 362 U.S. 17, 27 (1960) ("[T]here is the highest public interest in the due observance of all the constitutional guarantees[.]"). Indeed, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc.,* 23 F.3d at 1079. This Circuit has held that protecting the First Amendment's right of political expression is in the public's interest. *See Dayton Area Visually Impaired Persons v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) ("the public as a whole has a significant interest in . . . protection of First Amendment liberties"); *Doe v. Harlan County Sch. Dist.*, 96 F. Supp. 2d 667, 679 (E.D. Ka. 2000) (same) (cleaned up).

Conversely, enforcement of an unconstitutional law is against the public interest. *E.g.*, *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010) ("[T]he public, when the state is a party asserting harm, has no interest in enforcing an unconstitutional law."); *ACLU v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012) (same); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (same); *American Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir. 2003) (same).

The Supreme Court "has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981). "[T]here is practically universal agreement that

a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . ." *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *see also Knox v. SEIU, Local 1000,* 567 U.S. 298, 308-309 (2012) (same). Thus "speech concerning public affairs is more than self-expression; it is the *essence* of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (emphasis added).

Plaintiffs wish to participate in the process of self-government by engaging politically and/or supporting policies they believe should be adopted. It is not in the public's interest to continue enforcing an unconstitutional amendment that deprives citizens of their rights. The Court should grant a preliminary injunction.

CONCLUSION

For the foregoing reasons, Defendant Benson's Motion to Dismiss, VNP's Motion to Dismiss, and VNP's Motion for Judgement on the Pleadings should each be denied, and Plaintiffs' Motion for a Preliminary Injunction should be granted.

Dated: October 3, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing, and paper copies will be sent to those indicated as non-registered participants on October 3, 2019.

/s/ John J. Bursch

Attorney for Plaintiffs,