UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY DAUNT, et al.,

Plaintiffs,
v.

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

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.

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

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

Defendant,
and

HON. JANET T. NEFF

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

Intervenor-Defendant.
_____/

INTERVENOR-DEFENDANT VOTERS NOT POLITICIANS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(c) (DOCKET NO. 1:19-cv-614)

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Rules

Constitutional Provisions

LEGAL ARGUMENTS

I. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(b)(1) FOR LACK OF STANDING.

Plaintiffs lack standing because their submissions have made it plain that the relief requested would not redress the injury alleged, and that their claims are, in reality, an assertion of a generalized grievance shared by all who opposed the approval of Proposal 18-2.

As VNP has noted in its prior briefing, it is well established that a federal court is not "a forum for generalized grievances." *Gill v. Whitford,* ___ U.S. ___; 138 S.Ct. 1916, 1929; 201 L.Ed.2d 313 (2018); *Warth v. Seldin,* 422 U.S. 490; 95 S.C. 2197, 2205 (1975). Thus, a plaintiff must meet three requirements which together constitute the "irreducible constitutional minimum" for standing to satisfy the Article III "case or controversy" requirement: 1) an "injury in fact" – a harm that is both "concrete" and "actual or imminent, not conjectural or hypothetical"; 2) that the alleged injury is fairly traceable to the challenged conduct of the defendant"; and 3) that there is "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *Id.*; *Vermont Agency of Natural Resources v. United States, ex rel. Stevens,* 529 U.S. 765; 120 S.Ct. 1858, 1861-1862; 146 L.Ed.2d 836 (2000); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561; 112 S.Ct. 2130, 2136; 119 L.Ed2d 351 (1992).

Plaintiffs' contention that they state more than generalized grievances is misplaced. As previously discussed, Plaintiffs have asserted that they wish to serve on the new Commission and are aggrieved by their inability to do so, although 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. Plaintiffs have not retreated from their request that the new Redistricting Commission be invalidated in its entirety, and they have continued to assert that the challenged

qualifications for service cannot be severed from the new constitutional provisions in spite of the voters' adoption of a severability clause. Thus, Plaintiffs are not seeking a remedy that would allow them an opportunity to serve on the new Commission at all. Plaintiffs instead seek to prevent any implementation or use of the Commission to accomplish the purpose that the voters of Michigan intended. Plaintiffs are therefore not asserting an individualized grievance, but rather a generalized grievance shared by everyone who voted "no" on Proposal 18-2.

Plaintiffs contend otherwise, arguing that their grievance is more particularized than the general grievance felt by those who were opposed to the adoption of Proposal 18-2 because they belong to a smaller group of persons who are actually excluded from eligibility for service by the challenged restrictions. But they do not seek merely invalidation of the qualification requirements, but rather invalidation of the Commission. There is therefore no "'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *Vermont Agency of Natural Resources, supra,* 120 S.Ct. at 1861-1862; *Davis v. Detroit Public Schools Community District,* 899 F.3d 437, 443-444 (6th Cir. 2018); *Babcock v. Michigan,* 812 F.3d 531, 539 (6th Cir. 2016).[1]

When Plaintiffs' alleged injury is evaluated in light of the relief that they have sought, it becomes clear that their objection ***is*** a generalized grievance because their ultimate objective is precisely the same as the objective sought by every voter who opposed the adoption of the proposed constitutional amendment at the polls – to preserve the prior *status quo* by preventing the use of an independent Redistricting Commission for establishment of election districts.

[1] For this reason, plaintiffs' reliance on *Autor v. Blank,* 892 F. Supp. 2d 264 (D.D.C. 2012), *reversed on other grounds*, 740 F.3d 176 (D.C. Cir. 2014), is misplaced. There, the lobbyist plaintiffs actually (and genuinely) sought to be able to serve on the advisory committees, relief that would redress their injuries.

Finally, there is only a remote and speculative chance that plaintiffs would ever be randomly selected for service on the Commission even if they were not disqualified. For these reasons, Plaintiffs lack standing.

II. PLAINTIFFS' FIRST AND FOURTEENTH AMENDMENT CLAIMS FAIL AS A MATTER OF LAW.

A. THE DISQUALIFICATION OF PLAINTIFFS, BASED ON THEIR CONFLICTS OF INTEREST, DOES NOT VIOLATE THE FIRST AMENDMENT.

Michigan does not violate the First Amendment by disqualifying from the Commission those with a conflict of interest, or the appearance thereof. "Michigan deserves deference in structuring its government" because "the authority of the people of the States to determine the qualifications of their most important government officials . . . is a power reserved to the States under the Tenth Amendment and guaranteed them by [the Guarantee Clause] of the Constitution." *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 925 (6th Cir. 1998). Michigan's choice of qualifications must be upheld unless "plainly" in violation of another provision of the Constitution. *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991).

As VNP explained in its opening brief, *see* PageID.410-414, the Supreme Court has held that states may disqualify government officials from service based upon their conflicts of interest, and such rules do not violate the First Amendment. *See Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 131 (2011). The Court relied heavily on the long history of such rules, dating to the founding, and concluded that the drafters of the First Amendment could not have meant to prohibit the very conflict of interest rules they simultaneously enforced. *Id.* at 122.

Here, the voters of Michigan chose to disqualify from the Commission those persons most likely to have a conflict of interest, or the appearance thereof. *See Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (noting government's interest in avoiding "appearance of corruption"). Like

the disqualification rules upheld in *Carrigan*, the rules here target those with a direct or indirect pecuniary interest in the outcome of redistricting and those with the appearance of such an interest. Each category of disqualified person's employment, paycheck, job prospects, or financial support is affected, or has the appearance of being affected, by redistricting. *See* VNP Br., PageID.413. As the Supreme Court made clear in *Carrigan*, these rules do not implicate, let alone violate, the First Amendment.

Plaintiffs contend that *Carrigan* does not apply because that case involved the disqualification of legislators from voting on certain matters, rather than precluding their service altogether. Daunt Br., PageID.825. Plaintiffs are mistaken. Most governmental bodies—like the city council at issue in *Carrigan*—take action on a wide variety of issues and matters. A member of such a body may take hundreds or thousands of votes in a term in office, and so it makes sense to focus conflict of interest rules on particular matters. Not so for the Commission; it has just one task—adopting final districting plans for the state senate, state house, and Congress. *See* Mich. Const. Article IV § 6(14). Other than votes on administrative matters, the commissioners take only *three* votes, on a single subject. Plaintiffs' position—that Michigan must seat commissioners whom it may nonetheless disqualify from voting on the *sole issue* before them—is absurd. Under Plaintiffs' view, Michigan would be constitutionally required to seat commissioners even though they might *all* be disqualified from voting to adopt final plans. If a state may disqualify officials from voting on particular issues, then it may also disqualify persons from serving on a body that is tasked with deciding a single issue. A contrary rule would make no sense, and nothing in *Carrigan* nor the First Amendment compels it.

Plaintiffs also contend that *Carrigan* is inapplicable because in that case the Court noted that "a legislator's power is not a personal right; it belongs to the people," whereas here "the

ability to apply to the Commission belongs to the individual Plaintiffs." Daunt Br., PageID.826. Plaintiffs contend that conflict of interest principles only arise once they are allowed onto the Commission. *Id.* Not so. Commissioners have one job—voting on final plans. Just as in *Carrigan*, this single task is merely an exercise of a commissioner's "apportioned share of the [ ] power to the passage or defeat of a particular proposal," a power that "belongs to the people." *Carrigan*, 564 U.S. at 127. Michigan is not required to blind itself to prospective commissioners' conflicts of interest, which would prohibit them from voting on the sole decision faced by the Commission, until *after* the commissioner selection process is complete. In the context of a single-decision Commission, plaintiffs' argument seeking to avoid the holding of *Carrigan* is a distinction without a difference.

Nor does it matter, contrary to Plaintiffs' contention, *see* Daunt Br., PageID.826, that commissioners are also precluded for five years from running for office under the maps they adopt. The disqualification rules serve to protect against conflicts that already exist; the forward-looking prohibition prevents prospective conflicts. Plaintiffs cite no case holding that states are limited to addressing half of a problem.

In their opposition brief, Plaintiffs retreat from their reliance upon the patronage line of cases—the primary support cited in their preliminary injunction motion. This is likely because the Supreme Court and the Sixth Circuit have expressly held that policymaking positions—and partisan balance commissions in particular—are exempt from the rule precluding personnel decisions based upon partisan or political factors. *See Branti v. Finkel*, 445 U.S. 507, 518 (1980); *Sowards v. Loudon Cnty., Tenn.*, 203 F.3d 426, 436 (6th Cir. 2000); VNP Br., PageID.415-16. Instead, Plaintiffs now more generally cite the "unconstitutional conditions" doctrine. But the exception set forth in *Branti* and *Sowards* forecloses that argument. It is not

an unconstitutional condition on partisan activities—like the activities that disqualify Plaintiffs from service on the Commission—to foreclose membership on policymaking bodies as a result of those activities. Plaintiffs offer no response to VNP's argument that this exception applies—they entirely ignore it and have therefore waived any argument to the contrary. *See Garmou v. Kondaur Capital Corp.*, 2016 WL 3549356, *7 (E.D. Mich. 2016) ("It is well understood . . . that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.") (quoting *Rouse v. Caruso*, 2011 WL 918327, *18 (E.D. Mich. 2011)).

In any event, as the Supreme Court has explained in the case cited by Plaintiffs, the unconstitutional conditions doctrine loses force in the face of strong governmental interests justifying the conditions imposed. "[E]ven termination because of protected speech may be justified when legitimate countervailing government interests are sufficiently strong. . . . [T]he government's interest in achieving its goals as effectively and efficiently as possible is elevated . . . to a significant one when it acts as employer." *Bd. of Cty. Commr's, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 675-76 (1996) (internal quotation marks omitted). To the extent conflict of interest laws could even implicate the First Amendment, *see Carrigan*, 564 U.S. at 131, Michigan's interest in having commissioners who lack conflicts of interest, or the appearance thereof, is sufficiently significant to permit its commissioner disqualification rules. Moreover, as the Sixth Circuit has recognized, Michigan has strong interests in preserving its democratic system of government, including "foster[ing] electoral competition," "reducing the advantages of incumbency and encouraging new candidates," "dislodging entrenched leaders, curbing special interest groups, and decreasing political careerism." *Citizens for Legislative Choice*, 144 F.3d at 923 (quotation marks omitted). Michigan's interests in disqualifying

plaintiffs is surely at its apex when its regulations are aimed at the qualifications for one of its most important governmental bodies—the body that will determine the very structure of its government and political system. *See id.* at 925 (noting great deference afforded Michigan in structuring its government and setting qualifications for high level positions).

Because the disqualification rules do not implicate the First Amendment, Plaintiffs' contention that the rules are not narrowly tailored is misplaced. Moreover, even if the policymaking exception did not apply, strict scrutiny is not the correct framework. When the condition that is imposed on otherwise protected speech is eligibility for government employment, courts apply the *Pickering* balancing test. *See, e.g. Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (citing to *Pickering*) ("The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."); *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996) ("[W]here a government employer takes adverse action on account of an employee or service provider's right of free speech . . . we apply the balancing test from *Pickering*."); *Pickering v. Board of Ed. of Tp. High School Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 568 (1968); *Autor*, 740 F.3d at 183-84 (noting that the *Pickering* test applies to rule disqualifying lobbyists from serving on advisory committees). While Michigan's interest in enforcing the membership qualifications is compelling and its rules narrowly tailored, *see* VNP's Br., PageID.418–23, they need not be to pass muster under *Pickering*.

Rather, under the *Pickering* balancing test, courts must "seek 'a balance between the interests of the [employee], as a citizen'" engaging in otherwise protected speech, and "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick v. Myers*, 461 U.S. 138, 142 (1983) (quoting

Pickering, 391 U.S. at 568).[2] This balancing test "requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id*. at 150. Because interference with a public employer's work or public employee's job performance can detract from the function of a public employer, "avoiding such interference can be a strong state interest." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *see also Shirvell v. Dep't of Atty. Gen.*, 308 Mich. App. 702, 737 (Mich. Ct. App. 2015) (asserting that "it is sufficient if the government employer can show a reasonable likelihood that the speech may lead to" adverse effects such as whether the speech in question might "undermine[] a legitimate goal or mission of the employer" or "impede[] the performance of the speaker's duties").

The interest of Michigan in enforcing the Commission's disqualification rules outweigh those of the Plaintiffs and other potential Commission members. The sole enterprise of the Commission is to draw districts that will determine who gets elected in Michigan. The disqualification rules ensure that Commissioners perform their single role without conflicts of interest or the appearance thereof, and to create maps that do "not provide a disproportionate advantage to any political party" and do "not favor or disfavor an incumbent elected official or a candidate." Mich. Const. Article IV § 6(13)(d) and (e) . Failure to enforce the disqualification rules would risk the process being infected with the very conflicts of interest the voters sought to eliminate, would undermine public confidence in the electoral system, and would trample on Michigan's sovereign right—itself guaranteed by the Constitution—to set qualifications for its important governmental positions. Michigan's powerful interest in avoiding conflicts of

[2] Plaintiffs ought to be aware that the *Pickering* balancing test applies in cases such as these given that the Supreme Court's articulation of that standard in *Connick* came in the sentence directly following one cited by Plaintiffs in their opposition brief. *See* Daunt Br., PageID.824.

interest, ensuring public confidence in the very structure of its government, and protecting the ability of voters to choose their representative outweighs plaintiffs' interest in controlling redistricting.[3]

B. THE COMMISSION'S DISQUALIFICATION RULES DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

The Commission's disqualification rules do not violate the Equal Protection Clause for the same reasons that they do not violate the First Amendment. To withstand a challenge under the Equal Protection Clause, "statutes that do not interfere with fundamental rights or single out suspect classifications must bear only a rational relationship to a legitimate state interest." *Richland Bookmart, Inc. v. Nichols*, 278 F.3d 570, 574 (6th Cir. 2002).

In this case, the Commission's disqualification rules do not target any suspect class or interfere with any fundamental rights, including those guaranteed by the First Amendment. There is no First Amendment right to be appointed to the Commission. And as VNP explained in its opening brief, *see* PageID.410-14, states do not implicate the First Amendment by disqualifying members of a policy-making body based on anticipated conflicts of interest, even when those conflicts arise from protected political activities. *See Carrigan*, 546 U.S. at 124; *Branti*, 445 U.S. at 518; VNP Br., PageID.415–16. Because the disqualification rules do not burden a fundamental right or a suspect class, the proper standard is rational basis review.

Plaintiffs base their equal protection claim on the "over- and under-inclusiveness" of the Commission's disqualification rules. Daunt Br., PageID.830-831. They contend that the

[3] Plaintiffs' reliance upon *Autor* is misplaced. In that case, the court did not conclude that it violated the First Amendment to ban lobbyists from serving on advisory committees. Rather, the court merely concluded that the district court had failed to properly weigh the government's interests against the speech rights of the prospective lobbyist committee members. 740 F.3d at 184. Here, the government's interest in disqualifying those with conflicts of interest from serving on the Commission far outweighs whatever—if any—speech interests Plaintiffs posit.

Commission's rules violate the Equal Protection Clause by disqualifying some but not other individuals "who may be just as personally or privately interested" in redistricting. *Id.* But the Supreme Court and the Sixth Circuit have rejected under-inclusiveness arguments like those raised by the Plaintiffs so long as the distinction between classes is not "the result of invidious discrimination." *Richland*, 278 F.3d at 576 (6th Cir. 2002) (citing *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955), for the proposition that legislatures may properly "take one step at a time" in making reform); *see also Clements v. Fashing*, 457 U.S. 957, 971 (1982) ("A [law] is not devoid of a rational [basis] simply because it happens to be incomplete.").

Indeed, Michigan voters have adopted a sensible system to identify and disqualify those with a direct or indirect political or financial interest in the outcome of a redistricting effort. For example, employees of elected officials are disqualified because they have a direct pecuniary interest in their boss's reelection prospects, whereas volunteers do not. Candidates and elected officials to partisan offices stand to gain politically from new maps, whereas candidates to nonpartisan offices do not. Moreover, Plaintiffs offer nothing to suggest that the people of Michigan were motivated by "invidious" discriminatory intent. *Richland*, 278 F.3d at 576. They have instead properly exercised their inherent sovereign power to define the qualifications for important government offices, which has in turn furthered their compelling purpose of placing the power to draw political boundaries exclusively into the hands of citizens without a direct personal stake in the outcome of that process. *See Citizens for Legislative Choice*, 144 F.3d at 923; VNP Br., PageID.419. For this reason, the Commission's disqualification rules do not violate the Equal Protection Clause. Plaintiffs' constitutional claims should be dismissed.

RELIEF

WHEREFORE, Intervenor-Defendant Count MI Vote d/b/a Voters Not Politicians respectfully requests that this Honorable Court dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), and that upon consideration of Plaintiffs' constitutional challenges, the Court also grant a final judgment in favor of the Defendant and Intervenor-Defendant on the pleadings pursuant to Fed. R. Civ. P. 12(c).

Respectfully submitted,

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Dated: October 10, 2019

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CERTIFICATE OF COMPLIANCE

This document was prepared using Microsoft Word. The word count for Intervenor-Defendant's Reply Brief in Support of its Motion to Dismiss as provided by that software is 3,239 words which is less than the 4,300-word limit for a reply brief filed in support of a dispositive motion.

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2019, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the attorneys of record.

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