CASE NO. 19-2420

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN REPUBLICAN PARTY, LAURA COX, TERRI LYNN LAND, SAVINA ALEXANDRA ZOE MUCCI, DORIAN THOMPSON, and HANK VAUPEL,

Plaintiffs-Appellants,

v.

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

Defendant-Appellee,

(and)

COUNT MI VOTE, doing business as Voters Not Politicians,

Intervenor-Appellee.

On Appeal from the United States District Court for the Western District of Michigan

BRIEF OF APPELLANTS MICHIGAN REPUBLICAN PARTY, LAURA COX, TERRI LYNN LAND, SAVINA ALEXANDRA ZOE MUCCI, DORIAN THOMPSON, and HANK VAUPEL

ORAL ARGUMENT REQUESTED

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a), counsel for Appellants certifies that no parent corporation or publicly held corporation owns 10% or more of the stock of any party to this appeal.

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STATEMENT REGARDING ORAL ARGUMENT

This matter involves the venerable constitutional rights of free speech, association, and equal protection under the First and Fourteenth Amendments and therefore is of the utmost importance. Due to the importance and complexity of these issues, Appellants believe that oral argument will assist the Court in its review, and therefore, Appellants respectfully request oral argument. *See* Fed. R. App. P. 34(a).

JURISDICTIONAL STATEMENT

On August 22, 2019, the Michigan Republican Party ("MRP"), Laura Cox, Terri Lynn Land, Savina Alexandra Zoe Mucci, Dorian Thompson, and Hank Vaupel (collectively "Appellants") filed a complaint against Jocelyn Benson, in her official capacity as Secretary of State (the "Secretary"), identifying violations of the First and Fourteenth Amendments arising from the creation and administration of Michigan's Independent Citizens Redistricting Commission (the "Commission"). Appellants accompanied their complaint with a motion for preliminary injunction. The district court has subject-matter jurisdiction over this case under 28 U.S.C. §§ 1331 and 1343.

On September 6, 2019, the district court permitted Count MI Vote d/b/a Voters Not Politicians ("VNP") to intervene as a Defendant, and on September 11, 2019, the court entered an order consolidating this case with a similar case filed by 15 individuals. The court's consolidation order set a schedule for responding to the respective motions for preliminary injunction and for Defendants' anticipated motions to dismiss.

On November 25, 2019, the court entered an order denying Appellant's motion for preliminary injunction (the "Order"). Appellants timely filed a notice of

appeal on December 4, 2019, seeking review of the Order.[1] This Court has jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1).

[1] Plaintiffs in the consolidated case (the "Lead Case") filed a similar notice of appeal on November 26, 2019, which case was assigned No. 19-2377. Citations to the record are to the district court record in this case, rather than the Lead Case.

STATEMENT OF THE ISSUES

1. Did the district court commit reversible error in finding that Appellants are not likely to succeed on the merits of their claims that the creation and administration of the Commission violate their rights under the First and Fourteenth Amendments?

Appellants Answer: Yes

Appellees Answer: No

2. Did the district court commit reversible error by denying Appellants' motion for preliminary injunction?

Appellants Answer: Yes

Appellees Answer: No

STATEMENT OF THE CASE

This is an interlocutory appeal from the district court's Order denying Appellants' motion for preliminary injunction, which seeks to enjoin the Secretary, and her employees and agents, from implementing the constitutional provisions governing the creation and administration of the Commission.

MRP is a *major political party* under Michigan's Election Law, MICH. COMP. LAWS § 168.16, and the individual Appellants include MRP's current chair and members, affiliates, and relatives who are disqualified from the Commission. The Commission's structure and overly burdensome qualifications for membership impermissibly hamstring MRP's ability to participate effectively in the political process, bind MRP to the whims of political opponents, and punish the individual Appellants for their past participation in constitutionally protected political expression by barring them from participation in a fundamental aspect of American democracy. Appellants filed this action because the Commission's structure and eligibility requirements violate their rights under the First and Fourteenth Amendments and federal law, 42 U.S.C. § 1983. Specifically, the creation and administration of the Commission by the Secretary infringes on Appellants' freedoms of association and speech and their right to equal protection. All parties agree that the claims involve only questions of law.

Every ten years, Michigan adjusts its State legislative and congressional districts based on population changes reflected in the federal decennial census. Until November 2018, the Michigan Legislature was responsible for redrawing districts. Like most legislation, redistricting plans were adopted if approved by a majority vote in both legislative chambers and signed by the governor. State districts were adjusted most recently in 2011.

On November 6, 2018, Michigan voters passed a ballot proposal to amend the Constitution to provide for a new redistricting commission to adjust State legislative and congressional districts following the decennial census (the "Amendment"). As the district court recognized, the relevant facts are largely drawn from the Amendment. This case primarily concerns the eligibility criteria provided in Article IV, § 6(1) and the process for selecting commissioners under Article IV, § 6(2).

Subsection (1) of § 6, as amended, provides as follows:

> (1) An independent citizens redistricting commission for state legislative and congressional districts (hereinafter, the "commission") is hereby established as a permanent commission in the legislative branch. The commission shall consist of 13 commissioners. The commission shall adopt a redistricting plan for each of the following types of districts: state senate districts, state house of representative districts, and congressional districts. Each commissioner shall:
>
> (a) Be registered and eligible to vote in the State of Michigan;
>
> (b) Not currently be or in the past 6 years have been any of the following:

(i) A declared candidate for partisan federal, state, or local office;

(ii) An elected official to partisan federal, state, or local office;

(iii) An officer or member of the governing body of a national, state, or local political party;

(iv) A paid consultant or employee of a federal, state, or local elected official or political candidate, of a federal, state, or local political candidate's campaign, or of a political action committee;

(v) An employee of the legislature;

(vi) Any person who is registered as a lobbyist agent with the Michigan bureau of elections, or any employee of such person; or

(vii) An unclassified state employee who is exempt from classification in state civil service pursuant to article XI, section 5, except for employees of courts of record, employees of the state institutions of higher education, and persons in the armed forces of the state;

(c) Not be a parent, stepparent, child, stepchild, or spouse of any individual disqualified under part (1)(b) of this section; or

(d) Not be otherwise disqualified for appointed or elected office by this constitution.

* * *

MICH. CONST. Art. IV, § 6(1).[2]

[2] Section 6(1)(b) and (1)(c) are collectively referred to as the "Disqualifying Criteria."

Subsection (2) of § 6, as amended, provides in relevant part as follows:

(2) Commissioners shall be selected through the following process:

(a) The secretary of state shall do all of the following:

(i) Make applications for commissioner available to the general public not later than January 1 of the year of the federal decennial census. . . .

(ii) Require applicants to provide a completed application.

(iii) Require applicants to attest under oath that they meet the qualifications set forth in this section; 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.

* * *

(d) By July 1 of the year of the federal decennial census, from all of the applications submitted, the secretary of state shall:

(i) Eliminate incomplete applications and applications of applicants who do not meet the qualifications in parts (1)(a) through (1)(d) of this section based solely on the information contained in the applications;

(ii) Randomly select 60 applicants from each pool of affiliating applicants and 80 applicants from the pool of non-affiliating applicants. 50% of each pool shall be populated from the qualifying applicants to such pool who returned an application mailed pursuant to part 2(a) or 2(b) of this section, provided, that if fewer than 30 qualifying applicants affiliated with a major party or fewer than 40 qualifying non-affiliating applicants have applied to

serve on the commission in response to the random mailing, the balance of the pool shall be populated from the balance of qualifying applicants to that pool. The random selection process used by the secretary of state to fill the selection pools shall use accepted statistical weighting methods to ensure that the pools, as closely as possible, mirror the geographic and demographic makeup of the state; and

(iii) Submit the randomly-selected applications to the majority leader and the minority leader of the senate, and the speaker of the house of representatives and the minority leader of the house of representatives.

(e) By August 1 of the year of the federal decennial census, the majority leader of the senate, the minority leader of the senate, the speaker of the house of representatives, and the minority leader of the house of representatives may each strike five applicants from any pool or pools, up to a maximum of 20 total strikes by the four legislative leaders.

(f) By September 1 of the year of the federal decennial census, the secretary of state shall randomly draw the names of four commissioners from each of the two pools of remaining applicants affiliating with a major party, and five commissioners from the pool of remaining non-affiliating applicants.

MICH. CONST. Art. IV, § 6(2).

Finally, amended Article IV, § 6(11) restricts the matters that commissioners may discuss outside of a public meeting. Subsection (11) provides, in relevant part, as follows:

> 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.

MICH. CONST. Art. IV, § 6(11).

SUMMARY OF THE ARGUMENT

Appellants filed this action seeking to enjoin the Secretary from implementing the constitutional provisions governing the creation and administration of the Commission because the Commission severely burdens Appellants' rights of association, free speech, and equal protection. The district court erred in denying Appellants' motion for preliminary injunction because Appellants are likely to prevail on the merits of their claims, and in a case involving constitutional claims, likelihood of success is the critical inquiry, as the other factors presumptively weigh in favor of Appellants.

The Commission violates MRP's freedom of association by allowing applicants to self-designate an affiliation with MRP without any involvement whatsoever of the party, and those applicants may later be selected as Republican commissioners and standard bearers of the party, even though such individuals may not genuinely represent the interests of MRP's association. Freedom of association includes the right to determine the boundaries of the association, and to exclude individuals who do not share the association's common interests. The Commission also violates the individual Appellants' freedom of association by disqualifying

would-be applicants based solely on their participation in protected political expression. Worse yet, this disqualification is then imputed to the individual's family, regardless of whether those family members participated in any political activity. This disqualification applies if the individual participated in the political activities at any time within the preceding six years, and in terms of the initial Commission, operates retroactively despite the fact that the individual Appellants had no notice that such activities would bar them from serving on the Commission. Essentially, the Amendment retroactively punishes individuals who have undertaken core forms of protected political expression in the preceding six years by disqualifying them from the Commission. Such severe burdens cannot survive judicial scrutiny.

Next, the Commission discriminates against Appellants based on their viewpoint as Republican affiliates because the commissioner-selection process disfavors applicants who attest that they affiliate with one of the two major parties, including MRP, and favors applicants who attest that they do not affiliate with either major political party. Non-affiliating applicants receive the benefit of a larger applicant pool and a greater number of seats on the Commission, as compared to each pool of applicants who affiliate with a major party, including the pool of Republican affiliates. Less restrictive means are available to accomplish any purported interests.

Further, the Commission entirely restricts an entire topic of speech, contrary to the First Amendment, unless the speech occurs in writing or at an open meeting of the Commission. The plain language of the Amendment broadly applies the restriction to *all* speech of the Commission and its members, staff, and consultants regarding *any* redistricting matters, whether or not the speech involves official matters of the Commission. Less restrictive means are readily available to accomplish any purported interests (including means that already exist under state law), so Appellants are likely to prevail on the merits of this claim.

Finally, the Commission violates Appellants' right to equal protection because the commissioner-selection process arbitrarily distinguishes between qualified and disqualified applicants based on their exercise of fundamental freedoms, and it further distinguishes between those applicants who affiliate with one of the two major parties and those who do not affiliate with either major party. Would-be applicants who exercise their freedoms of association and speech through politically expressive activities such as candidacy are treated differently (disqualified) than those who do not participate in such activities and are qualified to serve on the Commission. Moreover, applicants who attest to an affiliation with one of the major political parties, like MRP, are treated worse than applicants who attest that they do not affiliate with either major party: non-affiliating applicants are

eligible for a larger applicant pool and greater number of seats on the Commission, as compared to each pool of applicants who affiliate with one of the major parties.

The Commission severely burdens Appellants' rights under the First and Fourteenth Amendments, and less restrictive means are available. Appellants are likely to prevail on the merits of their claims—the crucial inquiry in this case—and the remaining factors balance in favor of Appellants. The district court erred in denying Appellants' motion for preliminary injunction.

ARGUMENT

I. Standard of Review

In a conventional case involving a motion for preliminary injunction, the district court balances four factors: (1) whether the movant demonstrates a likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction. *Bays v. City of Fairborn*, 668 F.3d 814, 818-19 (6th Cir. 2012). When a party seeks a preliminary injunction on the basis of an alleged violation of the First Amendment, the determinative factor often is the likelihood of success on the merits because the other factors depend in large part on the constitutionality of the state action. *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014). "[T]he 'preliminary question of whether a movant is likely to succeed on the merits' is a question of law [the Court] review[s] de novo." *Cooper v. Honeywell Int'l, Inc.*, 884 F.3d 612, 616 (6th Cir. 2018) (quoting *Tumblebus Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005)). Likewise, the critical issue here involves the interpretation of a constitution, another purely legal question reviewed de novo. *Boler v. Earley*, 865 F.3d 391, 401 (6th Cir. 2017). Thus, the district court's determination is not entitled to any deference. *See Cooper*, 884 F.3d at 616.

"With regard to the factor of irreparable injury, . . . it is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)); *see also Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."). Thus, to the extent the movant establishes a likelihood of success on the merits, it also has established irreparable injury. *Husted*, 751 F.3d at 412.

Likewise, consideration of the public interest is dependent on the determination of the likelihood of success on the merits because "'it is always in the public interest to prevent the violation of a party's constitutional rights.'" *Reno*, 154 F.3d at 288 (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)); *see also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) ("[T]he public as a whole has a significant interest in . . . protection of First Amendment liberties.").

Because the factors of irreparable harm and consideration of the public interest largely depend on whether a constitutional violation exists, likelihood of success is the crucial inquiry.

II. Appellants Are Entitled to a Preliminary Injunction

The district court erred by determining that Appellants are not entitled to a preliminary injunction because Appellants have demonstrated that they are likely to succeed on the merits of their claims—the determinative factor—and the other factors weigh strongly in favor of issuing a preliminary injunction to prevent imminent and ongoing constitutional harms.

All parties agree that Appellants' motion involves only questions of law and not any disputed facts. (See District Court Opinion (the "Opinion"), R. 61, Page ID # 825 ("The parties agree that the propriety of preliminary injunctive relief turns on questions of law, not any contested facts.").) Accordingly, this Court need not give deference to the district court's determination. *Cooper*, 884 F.3d at 616.

A. Appellants Are Likely to Succeed on the Merits of Their Claims

As an initial matter, the district court erred in applying the deferential *Anderson-Burdick* test, as proposed by the Secretary, rather than the traditional standards for claims under the First and Fourteenth Amendments. (Opinion, R. 61, Page ID ## 850-51.) The *Anderson-Burdick* test applies to challenges involving administration of elections, not to claims involving eligibility for public office that infringe on other constitutional freedoms, as here. *See Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992); *Moncier v. Haslam*, 570 Fed. Appx. 553, 559 (6th Cir. 2014)

(the test applies "when reviewing constitutional challenges to state election laws"); *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015).

Under traditional standards for claims under the First and Fourteenth Amendments, the government must satisfy strict-scrutiny, i.e., the regulation must be narrowly tailored to achieve a compelling interest. *Democratic Party v. Reed*, 343 F.3d 1198, 1204 (9th Cir. 2003). The Secretary cannot satisfy that burden here. Moreover, even under the *Anderson-Burdick* framework, the Amendment is still subject to strict-scrutiny because it imposes a severe burden on Appellants' exercise of their constitutional rights. *See Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019) (recognizing that strict scrutiny applies under the *Anderson-Burdick* framework when a regulation imposes a severe burden).

1. The Commission Severely Burdens Appellant MRP's Freedom of Association

MRP sought to enjoin implementation of the Amendment on the grounds that it violates MRP's freedom of association under the First Amendment. The district court denied the motion, reasoning that MRP was not likely to prevail on the merits of its claim because the Amendment itself does not define what it means to be Republican or Democratic and also because, in the district court's judgment, commissioners are not standard bearers of a political party under the Amendment. (Opinion, R. 61, Page ID # 858.) The district court committed reversible error because it failed to apply the correct standard of review—strict scrutiny—where,

despite the district court's conclusion otherwise, the partisan-affiliated commissioners are standard bearers of the respective parties under the Amendment. The Amendment does not pass muster under strict scrutiny, and this Court should reverse.

"[T]he freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments." *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973) (citations omitted). The right to collective action includes the right of political parties to select their standard bearers. *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 v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1986) ("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 comprise its delegation is protected by the Constitution). The freedom of association protects not only a party's right to associate with others for the common advancement of political beliefs, but also its right to not associate with individuals who do not share common beliefs—that right is of particular importance in this case.

The right of a political party to select its standard bearers *and to exclude individuals who it believes do not represent its ideals* was 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 short, "[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.*

While the district court recognized the broad associational right acknowledged by the Supreme Court in *Jones*, the district court distinguished the case on the basis that "neither the Michigan constitutional amendment nor membership in the Commission defines what it means to be a Republican or a Democrat." (Opinion, R. 61, Page ID ## 858-59.) However, the lack of any definition merely exacerbates the harm to MRP. As Appellants articulated to the district court:

> 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. (Brief in Opp to Mot. to Dismiss, R. 48, Page ID # 637.)

The district court also erred in concluding that the self-designated Republican commissioners will not be MRP's standard bearers in the redistricting process. Under the Amendment, commissioner applicants may self-designate an affiliation with MRP without the political party's involvement or consent. Applicants that Secretary Benson subsequently selects as commissioners from the "Republican pool" become MRP's standard bearers serving as State public officials—just like any other official appointed or elected from groups of political nominees or candidates. (See Opinion, R. 61, Page ID # 848 (referring to commissioners as "state officers").) Indeed, the district court's conclusion that there is "'no basis' for the commissioners to be regarded as 'standard bearers' for the parties" is incorrect for many reasons.

As a preliminary matter, the Amendment itself identifies a vital role in which commissioners will serve as standard bearers for their self-designated party affiliates. To that end, the Amendment expressly sets forth several criteria that commissioners "shall abide by" when drawing the new districts. *See* MICH. CONST. Art. IV, § 6(13). While some of the criteria are objective, such as drawing districts

of equal population that are geographically contiguous, *see id.* § 6(13)(a)-(b), other criteria are patently subjective, undefined, and open to interpretation.

For example, the Amendment expressly provides that commissioners shall draw districts that "reflect the state's diverse population and communities of interest," where "[c]ommunities of interest may include, but shall not be limited to, populations that share *cultural or historical characteristics or economic interests*." *Id*. § 6(13)(c) (emphasis added). And while these communities of interest may not include "relationships with political parties, incumbents, or political candidates," *id*., there is no question that Democrats, Republicans, and even individuals who do not affiliate with either party possess vastly different opinions, not only as to what constitutes a *community of interest*, *cultural characteristic*, and *economic interest*, but also about which of those ought to be considered when deciding where to draw political boundaries. One need look no further than the recent flurry of federal litigation regarding redistricting—and even the VNP Proposal giving rise to the Amendment—to understand that these interests and characteristics are inherently political, and any argument otherwise is not worthy of serious consideration by this Court.

In the same vein, the fact that commissioners must weigh those interests in public meetings, available for all to see, bolsters the conclusion that the partisan-affiliated commissioners will be standard bearers for their respective parties in the

redistricting process. *See* MICH. CONST. Art. IV, § 6(10) (requiring commissioners to perform all of their business in open meetings and hearings "in a manner that invites wide public participation throughout the state"). Given the public spotlight under the Amendment, the partisan-affiliated commissioners will clearly be perceived and characterized as Republican and Democratic commissioners by press and public alike. Moreover, the Amendment itself requires the commissioners to retain their partisan affiliation through the conclusion of the redistricting process, meaning that it is not as though the commissioners will affiliate with a party during the application process only to lose their affiliation upon selection. *See id*. § 6(14) (requiring any final plan to be approved by at least two commissioners from each major political party). Rather, commissioners retain their affiliation through the entire process, and that affiliation plays a key role in determining which plan is ultimately adopted. As a result, the partisan-affiliated commissioners are clearly standard bearers for their respective parties, and any position otherwise is inconsistent both with the plain language of the Amendment and the practical realities flowing from its implementation. Therefore, the district court erred in concluding that the commissioners are not standard bearers of the corresponding parties.

Meanwhile, the combination of this system of self-designation and lack of party registration in Michigan can, and likely will, result in situations where those

who do not truly share the common beliefs of MRP are sorted into the pool of Republican candidates, selected as Republican commissioners, and thereby foisted upon MRP as its standard bearers on the Commission. 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 conducted without the party's involvement. *See, e.g., Democratic Party of Washington v. Reed*, 343 F.3d 1198, 1204 (9th Cir. 2003) ("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."). Because the Amendment divests the party of any role in selecting candidates who will represent the party as Republican commissioners and standard bearers of MRP, the Amendment imposes a severe burden on MRP's associational freedom and 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."); *LaRouche v. Fowler*, 152 F.3d 974, 997 (D.C. Cir. 1998) ("Nor is the Party required to accept [the candidate's] self designation as the final word on the matter.").

The district court incorrectly reasoned that the process of randomly drawing commissioners from pools of candidates absolves the selection process of any infirmity. (Opinion, R. 61, Page ID # 859.) That is wrong. Secretary Benson ***first***

sorts applicants who self-designate as affiliates of MRP—including those who may not actually share the common political beliefs of MRP—into a pool of supposedly like-minded party affiliates. At this point, the damage is done and the pool is tainted—randomly selecting commissioners from that pool cannot cure the harm. The Amendment forces MRP to accept commissioners chosen via a political game of Russian roulette. Applicants from this tainted, unverified Republican pool who do not share the common political beliefs of MRP stand the same chance of being randomly selected as a *bone fide* Republican applicant. The party will have no reliable means to determine an applicant's true political affiliation, no opportunity to exercise its rights to choose its representatives, and no recourse if a bad-faith registrant is randomly selected. *See Reed*, 343 F.3d at 1204 ("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*, 152 F.3d at 996 ("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 lacks the right to associate with an "unwilling partner" political party) (citation omitted). Although the court recognized the partisan nature of the commissioner office (Opinion, R. 61, Page ID # 832 (referring to commissioners as

"Democrats" and "Republicans")), it failed to appreciate the severe burden on MRP's rights arising from the flawed selection process.

The Amendment goes even further in violating MRP's associational rights by allowing a legislative leader of the opposite party to strike Republican applicants. *See* MICH. CONST. Art. IV, § 6(2)(e) (permitting legislative leaders affiliated with the Democratic Party to strike applicants who affiliate with MRP). The Amendment not only forces the MRP to accept associational representatives chosen through self-designation and random chance, but it also allows the Democratic Party to exercise control over the selection of MRP's standard bearers by providing Democratic leaders the ability to strike applicants who affiliate with MRP. This improper influence on a political party's process of selecting its standard bearer is precisely the type of unconstitutional activity struck down by the courts in *Jones* and *Reed*, and should meet the same fate in this case.

That the commissioners will draw districts from which *additional* standard bearers will later be elected (Opinion, R. 61, Page ID # 857) is irrelevant to the fact that *commissioners themselves serve as political standard bearers* in State public office. A political party's standard bearers in public office routinely make decisions that impact the future selection of standard bearers. The legislators who were formerly responsible for redistricting were no less political standard bearers because they drew district lines. The district court's cursory analysis overlooked this point.

The district court's decision should be reversed because it failed to apply the appropriate strict scrutiny standard where the partisan-affiliated commissioners are standard bearers of the respective political parties under the Amendment. The Amendment's commissioner-selection process imposes a severe burden on MRP's associational rights, and the State cannot satisfy strict scrutiny to justify the Amendment. Therefore, MRP has demonstrated a likelihood of prevailing on the merits of their claim, and the court should have granted the preliminary injunction.

2. The Commission Severely Burdens the Individual Appellants' Freedom of Association

The district court similarly erred in holding that the individual Appellants failed to show that they are likely to prevail on the merits of their First Amendment associational claims. Government regulations that infringe on First Amendment associational freedom can take many forms. *Roberts v. United States Jaycess*, 468 U.S. 609, 622-23 (1984) ("Among other things, government may seek to impose penalties or withhold benefits from individuals because of their membership in a disfavored group; it may 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)). The Amendment in this case excludes the individual Appellants from participation on the Commission due to the exceedingly broad Disqualifying Criteria, which are predominantly based on political activity and expression. The Amendment bars any would-be applicant who,

in the preceding six years, has engaged in protected political expression and participation through certain associational activities, including declared candidacy for partisan office, holding partisan elected office, and political party leadership. *See* MICH. CONST. art. 4, § 6, pt. (1)(b). These politically expressive activities are the core of the associational expression protected by the First Amendment. *See e.g.*, *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."). Moreover, the Amendment is given retroactive application by reaching back to disqualify individuals who participated in protected activity in the six years preceding the current application process. These individuals did not knowingly choose to waive their qualification for the Commission by exercising their First Amendment rights. Rather they are being retroactively punished for engaging in constitutionally protected activities. Even more egregiously, the Amendment bars their close relatives from service on the Commission without regard to whether they personally participated in these activities—a retroactive punishment for the past constitutionally protected actions of another.

Acting as a total bar to eligibility to serve on the Commission, the Disqualifying Criteria deny the individual Appellants an opportunity to apply for the Commission—a public office—unless Appellants are willing to give up their associational freedoms. The Disqualifying Criteria thus severely burden Appellants'

rights, forcing them to choose between foregoing protected politically expressive activities in association with MRP in order to be eligible for a future Commission that will not be created for another decade, on the one hand, or continuing those activities at the cost of deemed ineligibility, on the other hand. Contrary to the district court's assertions, this burden of exclusion is neither "minimal" nor "temporary" (see Opinion, R. 61, Page ID ## 846, 860). *Unless* Appellants are willing to give up their politically expressive activities for *at least six years* prior to applying for the Commission (and convince their immediate family members to give up their associational activities for at least six years prior to applying for the Commission), they will not be eligible to serve on the Commission. Of course, by that point the Commission's work will be complete and the new districts will be drawn and enacted. Those who happened to exercise their First Amendment rights in the six-year period prior to the current selection process are disqualified from the Commission (and effectively barred from participation in this redistricting cycle) without first being given even this impermissible choice—as are their relatives.

Although some regulation of political activity may be justified in certain cases, the Amendment goes much too far and cannot survive strict scrutiny. The Amendment does not restrict its limits on political activity to an individual's term as a commissioner to address undue influence, or its appearance, on *current* public employees and officials. *Cf. 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 current 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 current civil servants); *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). Unlike the regulations in these cases, the Amendment creates a prospective, total bar to public service on the Commission with retroactive effect based on prior political activities that occurred *at any time in the preceding six years*, regardless whether those political activities continue into the individual's term as a commissioner and without any notice to those participating in political activities that they were acting to disqualify themselves. 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).

Apparently conceding that the Amendment imposes *at least some burden* on Appellant's associational rights, the district court reasoned that "the State's interests in designating eligibility criteria for an effective redistricting commission are, on balance, more than sufficient to justify the challenged provisions." (Opinion, R. 61 Page ID ## 860-61.) However, because the Amendment imposes a *severe burden* on

Appellants' constitutional freedoms, the Amendment must survive strict scrutiny (not an intermediate balancing), a burden the State cannot overcome. (Opinion, R. 61, Page ID # 850 (recognizing that "[l]aws imposing 'severe burdens on plaintiffs' rights' are subject to strict scrutiny").)

In *Kusper*, for example, 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. 414 U.S. at 52. 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." *Id.* at 58. The same is true here. Although the Disqualifying Criteria do not prohibit individuals from all political activity in order to remain eligible for the Commission, the Amendment imposes a severe burden on 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," such as 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.

The court erred in finding that the Amendment does not impose a severe burden on Appellants' associational rights, noting that there is "no right to state office or appointment." (Opinion, R. 61, Page ID ## 850, 860-61 (adopting reasoning from the Lead Case).) While that may be true, it misses the point. Appellants do not claim an entitlement to office—but the First Amendment does protect Appellants from government regulations that impose a severe burden on their expressive activities *as a condition to eligibility* for public office. *See Rutan v. Republican Party*, 497 U.S. 62, 85 (1990) ("[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, . . . [it] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests."); *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 911 (6th Cir. 2019) ("The government may not deny an individual benefit, even one an individual has no entitlement to, on a basis that infringes his constitutional rights.").

The district court reasoned that the State's interest here is compelling because of its "fundamental interest in structuring its government." (Opinion, R. 61, Page ID # 851 (quoting *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 923 (6th Cir. 1998).) Appellants 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."). The State cannot simply rely on its sovereignty as justification for impermissibly burdening Appellants constitutional rights.

While eliminating conflicts of interest is a laudable goal (Opinion, R. 61, Page ID # 853), less restrictive alternatives are available to eliminate any conflicts of interest, many of which exist already in 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, when countless of those would-be applicants have no actual or apparent conflict of interest and could adequately perform the duties of commissioner.

In attempting "to squeeze every ounce of incumbent and legislative influence out of redistricting" (Opinion, R. 61, Page ID # 860), the State has thrown out the baby with the bathwater, wielding "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 those who have engaged in the proscribed 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). The redistricting commissions of other States demonstrate that other, less-restrictive means are available.

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.

As articulated below, Appellants are not necessarily opposed to the general concept of a redistricting commission, but any such redistricting commission must comport with the law. Appellants are likely to prevail on the merits of their claim because the Amendment imposes a severe burden on Appellants' and their family members' constitutional freedoms and cannot withstand judicial scrutiny. The Court should reverse the district court's decision.

3. The Commission Severely Burdens Appellants' Freedom of Speech Because the Amendment Discriminates Based on Viewpoint

Appellants are likely to prevail on the merits of their claim of viewpoint discrimination. Under 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 (collecting 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).

"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)).

Although the court appropriately recognized these general legal principles, it failed to accurately apply them to the facts of this case. (Opinion, R. 61, Page ID ## 862-63.) Here, the Amendment expressly discriminates against applicants based on their political viewpoint, specifically favoring those applicants who do not affiliate with either major political party over applicants who affiliate with either major party, including applicants affiliating with MRP. Based on an applicant's self-designated affiliation, or lack thereof, the Amendment sorts applicants into one of three pools:

(1) Republican applicants, from which **60** applicants are initially selected, **four** of whom will serve as commissioners ("Pool 1");

(2) Democratic applicants, from which **60** applicants are initially selected, **four** of whom will serve as commissioners ("Pool 2"); and

(3) Applicants who do not affiliate with either major political party, from which **80** applicants are initially selected, **five** of whom will serve as commissioners ("Pool 3").

See MICH. CONST. art. 4, § 6, subpts. (2)(a)(iii) and (2)(d)(ii) (describing classes of applicants and applicant pools). Through this specific allocation of commissioner

seats, which guarantees Republican applicants (Pool 1), a lesser number of seats than the pool of applicants who affiliate with neither major political party (Pool 3), the Amendment discriminates against Republican applicants based on their sworn party affiliation—i.e., based on their viewpoint. In other words, an applicant in Pool 3 is eligible for a larger pool (80 as compared to 60) and a greater number of seats on the Commission (five as compared to four).[3]

Like the Secretary, the district court mistakenly reasoned that, if anything, Republican commissioners have an advantage, stating: "Members affiliated with the Republican party have the same number of members as the Democratic affiliation and *more members* than those reserved for those who maintain affiliation with any other party." (Opinion, R. 61, Page ID # 863 (emphasis added).) With due respect, four is not greater than five, and the Amendment specifically favors applicants who attest under oath that they do not affiliate with the Democratic Party or the Republican Party—a "do not affiliate with either major political party" perspective. Furthermore, it is entirely possible that the third pool of applicants, Pool 3, could share another perspective or affiliation not shared by Republican commissioners.

Commissioners who share a political party affiliation also are likely to share other ideologies and viewpoints, some of which undoubtedly will influence their

[3] This same disparity exists between Pool 2 and Pool 3, but Appellants are not raising a claim on behalf of Democratic applicants.

perspectives about redistricting beyond the impermissible subjects provided 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. *See Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 129-30 (2011) (Kennedy, J., concurring) ("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.").

Again, 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. IDAHO CONST. art. 3, § 2. Or the State legislative leaders could appoint some Commissioners, and those Commissioners could then select additional members of the Commission, like the system in Arizona. ARIZ. CONST. art 4, pt. 2, § 1(8). Or the Amendment could have ignored partisan affiliation

altogether. Plaintiffs, however, do not bear the burden of proposing a new system that can withstand constitutional scrutiny. It is adequate that less restrictive alternatives exist. *See Playboy Entm't*, 529 U.S. at 816. Accordingly, Appellants are likely to prevail on their claim of viewpoint discrimination.

4. The Commission Severely Burdens Appellants' Freedom of Speech Because the Amendment Broadly Restricts an Entire Topic of Speech

Appellants also have established a likelihood of prevailing on the merits of their claim regarding restricted speech. The Amendment 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 *Consol. 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.*

The district court implicitly concedes that the Amendment exceeds the Constitution's limits, as the court interpreted the above language to extend "only to official speech made by commissioners in their official capacity." (Opinion, R. 61, Page ID # 864.) While that interpretation may lessen the burden imposed by the Amendment, it does not reflect the regulation's plain language, which purports to restrict speech regarding any "redistricting matters." MICH. CONST. art. 4, § 6, subsection (11). In other words, the term "official" does not precede "redistricting matters" in the text of the Amendment.

As written, the Amendment prohibits the "commission, its members, staff, attorneys, and consultants" from any speech regarding redistricting matters, unless in writing or at a public meeting. *See id.* It cannot reasonably be disputed that the Amendment's regulations target a specific subject matter—redistricting—and, therefore, the speech regulations are content based. Thus, the regulation is subject to strict scrutiny. *Reed*, 135 S. Ct. at 2226 ("Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are 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—again, the Amendment's plain language does not limit the restriction to "official" speech only. Thus, the Amendment "prohibits a substantial amount of protected speech both in an absolute sense and relative to [its] plainly legitimate sweep." *O'Toole v. O'Connor*, 802 F.3d 783, 789 (6th Cir. 2015) (citing *Speet v. Schuette*, 726 F.3d 867, 872 (6th Cir. 2013)) (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 State cannot justify the Amendment's speech regulations by the mere fact of employment or service on the Commission by the listed 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 state legislative and congressional districts that create the foundation of representative democracy of the State.

Defendant contends that the restriction is justified by the governmental interest of transparency. (Brief in Opp. to Preliminary Injunction in Lead Case, R. 36, Page ID # 470.) Although transparency may be a laudable goal, the Amendment is not narrowly tailored and fails scrutiny. The Amendment's restriction is overly broad, restricting official and unofficial speech, public or private, on all redistricting matters (even if 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 (at least by its plain language) extends to all discussions of anything related to redistricting. Nor does the Amendment apply only to deliberations by a quorum of the Commission, or to communications among commissioners and staff. Therefore, 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 Amendment's sweep is far too broad and unconstitutionally restricts speech. Appellants are likely to prevail on the merits of their claim.

5. The Commission Results in Disparate Treatment of Appellants Based on Their Exercise of Fundamental Rights

Finally, the district court erred in determining that Appellants had not shown a likelihood of success on the merits of their Equal Protection claim. As Appellants demonstrated above, the Amendment distinguishes between applicants in a manner that involves—and severely burdens—Appellant's fundamental rights of association and speech; therefore, the district court incorrectly applied rational basis review. (Opinion, R. 61, Page ID ##865-66 (finding Appellants "unlikely to succeed in demonstrating that the eligibility criteria impose a severe burden on their First Amendment rights. . . . [T]he difference in treatment between persons within and outside these categories rationally furthers a legitimate state interest.").)

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 distinguishes between commissioner applicants 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 Appellants, 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 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.

The politically expressive activities that disqualify would-be applicants from service clearly 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. This is further exacerbated by the fact that the Amendment acts to disqualify persons on a retroactive basis. Political speech in the preceding six years before the Amendment's adoption disqualifies both the individual and close relatives of the individual without notice that the protected First

Amendment speech would have such a negative disqualifying impact in the future. So any argument that individuals have a choice whether to participate in First Amendment protected activity or seek to qualify as a commissioner lacks any application to these individuals and their family members.

The State may not condition commissioner eligibility on candidates relinquishing such venerable constitutional rights. *McCabe*, 12 F.3d 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 . . . ."). 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. Stated differently, foregoing certain First Amendment rights is a condition of eligibility to serve on the Commission, imposing a severe burden on Appellants' 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. 1981)).

The Secretary[4] 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. (Opinion, R. 61, Page ID # 852 (summarizing the Secretary's argument).) 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 commissioners and staff, like the limitations of the Hatch Act. 5 U.S.C. § 7323. Similarly, avoiding a perceived conflict of interest is not sufficient reason to justify the imputed disqualification to family members under MICH. CONST. art. 4, § 6, subpt. (1)(c).

The Secretary's reliance on cases involving anti-nepotism regulations is misplaced. (Opinion, R. 61, Page ID ## 852-53.) Even assuming those cases stand for the proposition that anti-nepotism regulations can be justified by a compelling government interest under some circumstances, the Amendment goes much farther than the regulations in those cases. Indeed, 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 individual must have the power to

[4] The district court adopted the arguments of the Secretary. (Opinion, R. 61, Page ID # 853.)

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 the Secretary cited below are distinguishable because they are limited to situations where relatives *concurrently* would be in a position to provide and receive a benefit, but most individuals the Amendment excludes 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, 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.[5] *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.").

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

[5] See, supra, Part II.A.3.

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*, No. 2:19-cv-01477, 2019 U.S. Dist. LEXIS 170704 (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).

The district court's ruling that rational basis applies is incorrect because the distinctions drawn by the Amendment severely burden the fundamental right of association. Appellants 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 Appellants' fundamental rights requires more than a rational basis.

The Secretary argued below 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 political affiliation may in some cases be an appropriate requirement for certain public employment, *Branti v. Finkel*, 445 U.S. 507 (1980), the exercise of that authority must survive scrutiny—Appellants 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 the Secretary cited below provide for a maximum number of members who may be affiliated with the same political party—the regulations for the commissions do not guarantee minority representation to a political party, like the Amendment does. *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 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"). Unlike the other public bodies the Secretary referenced, 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, in any case, Appellants are not required to formulate a rule that would pass constitutional muster.

Appellants are not seeking any advantage in the commissioner-selection process. To the contrary, Appellants are seeking only the same (equal) treatment given non-affiliating applicants. For the foregoing reasons, Appellants have demonstrated a likelihood of success on the merits of their Equal Protection claim, and this Court should reverse the decision of the district court.

B. The Remaining Preliminary Injunction Factors Weigh in Favor of Appellants

1. Appellants Have Suffered and Will Continue to Suffer Irreparable Injury Absent an Injunction

Appellants will suffer irreparable injury if a preliminary injunction is not entered. This Court recognizes: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *McNeilly v. Land*, 684 F.3d 611, 620 (6th Cir. 2012) (quoting *Elrod*, 427 U.S. at 373). In fact, even the *threat* of Plaintiffs being deprived a constitutional right is sufficient to weigh in favor of a finding on this prong of the analysis. *See Elrod*, 427 U.S. at 373 ("It is clear therefore that First Amendment interests were either threatened or in fact

being impaired at the time relief was sought. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

The district court determined that Appellants had not demonstrated irreparable injury absent a preliminary injunction, characterizing the Secretary's arguments regarding the timing of applications for the Commission as "well taken." (Opinion, R. 61, Page ID # 867.) However, the fact that commissioner applications may be submitted until June 2020 misses the mark. Appellants *currently* are ineligible to apply to serve on the Commission, a fact expressly recognized in the State application process administered by the Secretary, which informs applicants who mark that they satisfy one or more of the Disqualifying Criteria:

> **According to the Michigan Constitution, you aren't eligible to serve as a commissioner.**
>
> Your answer 'Yes' to [certain application questions regarding eligibility criteria] disqualifies you from serving in the 2020-2022 Commission. You may still submit your application, but *the Secretary of State office will be required to remove your application*.[6]

Such instruction to potential applicants, including Appellants, discourages and burdens their exercise of constitutional rights, as previously discussed, *both presently and in the future*. Appellants have demonstrated through their declarations that they wish to apply to serve on the Commission, and they are entitled to do so in

[6] See https://redistrictingapplication.sos.state.mi.us/ (follow prompts to begin application) (italicized emphasis added) (last visited December 3, 2019).

a manner that does not unconstitutionally penalize their prior politically expressive activities under the First Amendment. Appellants may not be forced to suffer the continued infringement of their constitutional rights until June 2020, or later, when they obtain a final ruling on the merits of their claims. Appellants already have suffered, and will continue to suffer, irreparable harm. The district court erred in ruling that this factor balances in the Secretary's favor.

2. An Injunction Would Not Cause Substantial Harm to Others and Would Serve the Public Interest

As discussed, in a case like this one, "the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the statute." *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007). "[I]f the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment." *Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001). Appellants have demonstrated a likelihood of success on the merits of their claims; therefore, this showing precludes the Secretary or any third party from credibly asserting that any purported harm to others weighs against issuance of a preliminary injunction in this case.

In denying Appellants' motion for a preliminary injunction, however, the district court sought to preserve "the status chosen by the voters . . . as this case progresses through the courts toward final resolution." (Opinion, R. 61, Page ID #

868.) Regardless of the fact that the Commission was created pursuant to initiative, neither the citizenry at large nor the Secretary is entitled to the continued administration of a redistricting scheme that violates Appellants' fundamental freedoms under the United States Constitution. The district court erred in denying Appellants' motion and by failing to preserve the true status quo that existed in Michigan for decades prior to the *recent* adoption of the Commission in November 2018, i.e., redrawing of districts by a legislative body of duly elected representatives of the people of Michigan.

C. The District Court Erred in Denying Appellants' Motion for Preliminary Injunction

As in this case, when a party seeks a preliminary injunction on the basis of an alleged violation of the First Amendment, the determinative factor frequently is the likelihood of success on the merits because the other factors depend in large part on the constitutionality of the state action. *Husted*, 751 F.3d at 412; *see also* Opinion, R. 61, Page ID # 839 ("[T]he factors of irreparable harm and consideration of the public interest largely depend on whether a constitutional violation exists."); Opinion, R. 61, Page ID # 855 ("Again, the remaining factors largely depend on whether a constitutional violation exists."). This "determinative factor" involves a question of law that this Court reviews de novo; therefore, the district court's decision regarding Appellant's motion for preliminary injunction is not entitled to any deference. Because the district court erred in finding that Appellants are not

likely to succeed on the merits of their claims, and because the remaining preliminary injunction factors weigh heavily in favor of Appellants, as previously discussed, this Court should reverse the decision of the district court.

CONCLUSION

Wherefore, Appellants respectfully request that this Court reverse the decision of the district court and enter an Order directing the district court to grant Appellants' motion for preliminary injunction.

Dated: December 24, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2019, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record. I hereby certify that I have mailed by United States Postal Service the same to any non-ECF participants.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

The following documents from the District Court's record are relevant to this appeal:

Record Entry No.	Docket Text	Page ID Nos.
1	Complaint, with exhibits	1-34
2	Motion for Preliminary Injunction	35-37
3	Brief in Support of Motion for Preliminary Injunction, with exhibits	38-94
21	Answer to Complaint by Count MI Vote	186-226
23	Response in Opposition to Motion for Preliminary Injunction by Count MI Vote	230-233
24	Brief by Count MI Vote in Opposition to Motion for Preliminary Injunction	234-278
25	Motion for Order of Dismissal and Judgment by Count MI Vote	279-283
26	Brief in Support of Motion for Order of Dismissal and Judgment by Count MI Vote	284-324
27	Response in Opposition to Motion for Preliminary Injunction by Count MI Vote	325-328

28	Brief in Opposition to Motion for Preliminary Injunction by Count MI Vote	329-372
29	Motion for Order of Dismissal and Judgment by Count MI Vote	373-377
30	Brief in Support of Motion for Order of Dismissal and Judgment by Count MI Vote	378-416
31	Response in Opposition to Motion for Preliminary Injunction by Jocelyn Benson, with exhibits	417-480
34	Motion to Dismiss by Defendant Jocelyn Benson	485-490
35	Brief in Support of Motion to Dismiss by Jocelyn Benson	491-503
37	Response in Opposition to Motion for Preliminary Injunction by Jocelyn Benson, with exhibits	506-575
40	Motion to Dismiss by Jocelyn Benson	580-587
41	Brief in Support of Motion to Dismiss by Jocelyn Benson, with exhibits	588-609
48	Response to Motion to Dismiss, Motion for Order of Dismissal and Judgment and Reply to Defendants' Responses to Motion for Preliminary Injunction, with exhibits	622-701

51	Response to Motion to Dismiss, Motion for Order of Dismissal and Judgment and Plaintiffs' Consolidated Reply in Support of Motion for Preliminary Injunction by Anthony Daunt	707-745
53	Reply to Response to Motion filed by Count MI Vote	747-764
54	Reply to Response to motion filed by Count MI Vote	765-784
55	Reply to Response to Motion filed by Jocelyn Benson	785-802
61	Opinion	823-868
62	Order Denying Motions for Preliminary Injunction	869-870
65	Notice of Interlocutory Appeal	877-878