No. 19-2377

IN THE
United States Court of Appeals
FOR THE SIXTH CIRCUIT

ANTHONY DAUNT, *et al.*,

Plaintiffs-Appellants,

v.

JOCELYN BENSON, in her official Capacity as Michigan Secretary of State, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
AT GRAND RAPIDS

CORRECT BRIEF OF PLAINTIFFS-APPELLANTS

Jason Torchinsky
Jonathan P. Lienhard
Shawn Sheehy
Dennis W. Polio
HOLTZMAN VOGEL JOSEFIAK TORCHINSKY PLLC
45 N. Hill Drive, Suite 100
Warrenton, VA 20186
P: (540) 341-8808
F: (540) 341-8809
jtorchinsky@hvjt.law
jlienhard@hvjt.law
ssheehy@hvjt.law
dwpolio@hvtj.com

John J. Bursch
BURSCH LAW
9339 Cherry Valley, S.E., Suite 78
Caledonia, MI 49316
616-450-4235

Eric E. Doster
DOSTER LAW OFFICES, PLLC
2145 Commons Parkway
Okemos, MI 48864
(517) 977-0147
eric@ericdoster.com

Counsel for Plaintiffs Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for Appellants certify that no party to this appeal is a subsidiary or affiliate of a publicly owned corporation and no publicly owned corporation that is not a party to this appeal has a financial interest in the outcome. Appellants are 15 individuals.

By: /s/ Jason Torchinsky
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

Michigan Board of State Canvassers, *Official Ballot Wording approved by the Board of State Canvassers August 30, 2018 Voters Not Politicians*, https://www.michigan.gov/documents/sos/Official_Ballot_Wording_Prop_18-2_632052_7.pdf.....45, 46, 47

Office of Secretary of State Jocelyn Benson, *Commissioner Eligibility Guidelines*, https://www.michigan.gov/sos/0,4670,7-127-1633 _91141-501739--,00.html 8, 34, 40, 52

State of Michigan, Office of Secretary of State, *Frequently Asked Questions*, https://www.michigan.gov/sos/0,4670,7-127-1633_91141-488602--,00.html 9

State of Michigan, Secretary of State, *Application for Citizens Redistricting*, https://redistrictingapplication.sos.state.mi.us.....7

Voters Not Politicians, *We Ended Gerrymandering in Michigan*, https://votersnotpoliticians.com/redistricting 31, 35

STATEMENT REGARDING ORAL ARGUMENT

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

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants brought this action pursuant to 42 U.S.C. § 1983 asserting violations of the First and Fourteenth Amendments of the U.S. Constitution.

This appeal involves the United States District Court for the Western District of Michigan's November 25, 2019, Opinion and Order Denying Motion for Preliminary Injunction, RE 67, PageID#926-971; RE 68, PageID#972-973. Plaintiffs-Appellants sought this preliminary injunction to enjoin the Michigan Secretary of State from implementing the recently created "Michigan Citizens Redistricting Commission," including any preparations for the selection of commissioners. On December 5, 2019, Plaintiffs-Appellants filed their notice of interlocutory appeal from the District Court's order denying injunctive relief. Notice of Appeal, RE 71, PageID#980-981. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Michigan's recently enacted Michigan Citizens Redistricting Commission prohibits certain citizens from serving as commissioners based on nothing more than their political activities and associations, or that of their relatives, all in violation of Plaintiffs-Appellants' First and Fourteenth Amendment rights. Furthermore, these unconstitutional provisions are not severable from the remaining portions of the law that created the Commission. The issue presented for review is whether the District Court erred when it denied Appellants' Motion for Preliminary Injunction.

STATEMENT OF THE CASE

This case concerns the prohibitions by which Michigan disqualifies individuals from serving on the Michigan Citizens Redistricting Commission, an entity that has been assigned the task of drawing Michigan's state and federal legislative districts for future elections. Specifically, the Commission's scheme excludes otherwise-qualified citizens from serving on the Commission simply because of their previous exercise of First Amendment rights, or their close relation to someone who has exercised such rights. Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#936-939. Plaintiffs-Appellants are otherwise eligible to become Commission members but are excluded from eligibility. They assert that this disqualification injures their First and Fourteenth Amendment Rights under the U.S. Constitution.

Because the qualification provisions are not severable from the remainder of the Commission's enabling provisions, Plaintiffs-Appellants sought a preliminary injunction from the United States District Court for the Western District of Michigan to enjoin the Secretary of State from implementing the Commission and preparing for the selection of commissioners.

Factual Background

The Commission, established by a constitutional amendment passed by ballot proposal in November, 2018, *see* Mich. Const. art. IV, § 6(1)(B)-(C), (the "Amendment"), is tasked with redrawing Michigan's congressional and state legislative districts every 10 years following the decennial census. Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#928-929. The Commission is meant to replace the existing legislative redistricting process and eliminate nearly all legislative oversight of that process. *Id*.

The Michigan Secretary of State is responsible for administering the application and selection process for members of the Commission. Mich. Const. art IV, § 6(2). The Secretary of State must make applications to serve on the Commission available from January 1, 2020, through June 1, 2020. *Id*. at § 6(2)(A), (C). This includes the mailing of applications to at least 10,000 randomly selected registered voters encouraging them to apply. *Id*. at § 6(2)(A). The Secretary of State will randomly select 200 finalists from the qualified applicants, including 60 who self-identify as Republican, 60 who self-identify as Democratic, and 80 who self-identify as unaffiliated with either major political party. *Id*. at § 6(2)(D)(II). The selection process must be statistically weighted so that the pool of 200 finalists mirrors the geographic and demographic makeup of Michigan as closely as possible. *Id*. The majority and minority leaders in the Michigan House

and Senate may reject up to five applicants each (20 total) before the final 13 commission members are randomly selected from among the finalists. *Id*. at § 6(2)(E). Commissioners must be selected by September 1, 2020. *Id*. at § 6(2)(F). Commissioners must be registered and eligible to vote in Michigan to be eligible to serve on the Commission. *Id*. at § 6(1)(A).

There are certain activities and associational relationships that disqualify a citizen from serving on the Commission. Each commissioner shall not currently be or, in the past six years, have been any of the following:

- A candidate or elected official of a partisan federal, state or local office;
- An officer or member of the leadership of a political party;
- A paid consultant or employee of an elected official, candidate, or political action committee;
- An employee of the legislature;
- Registered as a lobbyist or an employee of a registered lobbyist;
- A political appointee who is not subject to civil service classification;
- Any parent, stepparent, child, stepchild, or spouse of any individual that falls into one of the above categories.

Id. at § 6(1)(B), (C). For example, if a parent has a daughter in the employ of a registered lobbyist, that parent is barred from serving. Additionally, "[f]or five years after the date of appointment, a commissioner [would be] ineligible to hold a partisan elective office at the state, county, city, village, or township level in Michigan." *Id*. at § 6(1)(E).

The Commission application is now live on the Secretary of State's website.[1] This application asks a series of questions to " … make sure you're eligible and don't have any conflicts that would keep you from serving on the Citizens' Redistricting Commission." *Id*. The application explains that if the applicant answers "yes" to any one of the following statements, the applicant is "not eligible to serve on the Commission . . .":

> (1) I am now, or have been at any time since August 15, 2014
>
> a. A declared candidate for a partisan federal, state, or local office.
> b. An elected official to partisan federal, state, or local office.
> c. An officer or member of the governing body of a national state or local political party.
> d. 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.
> e. An employee of the legislature.
> f. A lobbyist agent registered with the Michigan Bureau of Elections.
> g. An employee of a lobbyist registered with the Michigan Bureau of Elections.
> h. An unclassified state employee pursuant to Article XI, Section 5 of the Michigan Constitution.
>
> (2) I am a parent, stepparent, child, stepchild, or spouse of a person to whom one or more of sections (a) through (h), above, would apply.
> (3) I am disqualified for appointed or elected office in Michigan.

Id.

The application also asks applicants to state whether they identify with the Democratic Party, the Republican Party, or neither. *Id*. In addition, it provides the

[1] State of Michigan, Secretary of State, *Application for Citizens Redistricting*, https://redistrictingapplication.sos.state.mi.us.

applicant with the option of explaining his or her affiliation with the following question: " … [b]ecause Michigan voters do not register to vote by political party, if you would like to describe why – or how – you affiliate with either the Democratic Party, Republican Party, or neither, please do so below." *Id*.

The Secretary of State released on her website "Commissioner Eligibility Guidelines" that clarify the scope of the categories of individuals excluded from eligibility to serve on the Commission.[2] For example, the guidelines specify that a candidate for judge is eligible to serve on the Commission because judicial officers are non-partisan, *id*., even though some Michigan judges are nominated on a partisan basis. Volunteers of an elected official, political candidate, campaign, or political action committee are eligible to serve on the Commission because volunteers are not paid for their services. *Id*. In contrast, any individual serving as a paid consultant or employee of a non-partisan elected official, non-partisan political candidate, or non-partisan local political candidate's campaign since August 15, 2014, are not eligible to serve on the Commission because the language of the exclusion is not explicitly limited to partisan offices. *Id*.

Each commissioner holds office until the Commission has completed its obligations for the census cycle. Mich. Const. art 4, § 6(18). Commissioners

[2] The Office of Secretary of State Jocelyn Benson, *Commissioner Eligibility Guidelines*, https://www.michigan.gov/sos/0,4670,7-127-1633_91141-501739--,00.html.

receive compensation equal to at least 25% of the Governor's salary, and the State will reimburse commissioners for costs incurred if the legislature does not appropriate sufficient funds to cover these costs. *Id*. at § 6(5). As of 2019, the Governor of Michigan earns a salary of approximately $160,000 a year, meaning a commissioner will be compensated at least roughly $40,000. State of Michigan, Office of Secretary of State, *Frequently Asked Questions*, https://www.michigan.gov/sos/0,4670,7-127-1633_91141-488602--,00.html. *See also* Marissa Perino and Dominic-Madori Davis, *Here's the salary of every governor in all 50 US states*, Bus. Insider, https://www.businessinsider.com/governor-salary-by-state-2018-1#michigan-22.

The Amendment contains a severability clause that provides for severance of any provision found to conflict with the United States Constitution or federal law. Mich. Const. art. IV, § 6(20). However, that clause does not preclude a court from determining whether any unconstitutional provision cannot be severed.

Procedural History

On July 30, 2019, Plaintiffs-Appellants filed this Case against Secretary Benson, in her official capacity, alleging that the Commission's membership-exclusion scheme violates the First and Fourteenth Amendments. Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#936. Plaintiffs-Appellants are individuals who are excluded from serving on the Commission because they fall

into one or more of the ineligibility categories. Complaint, RE 1 PageID#2-3; Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#936-939. Plaintiffs-Appellants include individuals who are current or former declared candidates for local partisan office; incumbents in the Michigan Legislature; partisan precinct delegates; officers and members of the governing bodies of national, state, or local political parties; consultants and employees to candidates for a federal, state, or local office or a political action committee; an employee of the state legislature; a registered lobbyist; an unclassified state employee; and their family members. Complaint, RE 1, PageID#6-8; Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#936-939. Thus, Plaintiffs-Appellants—who each desire to serve on the Commission—are excluded from consideration. *Id*.

Plaintiffs-Appellants sought a declaration that the exclusionary criteria set forth in Article IV, Section 6(1)(B) and (C) of Michigan's Constitution are unconstitutional and, further, that the entire Commission must be invalidated because the challenged provision is inseparable from the remainder of the provisions establishing and implementing the Commission. Complaint, RE 1, PageID#3. Plaintiffs also sought a preliminary injunction directing the Secretary of State to suspend her implementation of all provisions of the Michigan Constitution relating to the Commission. *Id*.; Motion for Preliminary Injunction, RE 4, PageID#53-90.

On August 22, 2019, the District Court allowed "Count MI Vote" d/b/a "Voters Not Politicians" (hereinafter VNP) to intervene as a Defendant in this action. VNP filed the initiative petition that was eventually adopted as the Amendment.

On September 11, 2019, at Defendants' request, Plaintiffs-Appellants' case was consolidated with a second challenge to the Commission by members of a political party. Motion to Consolidate, RE 27, PageID#314-318; Order Granting Motion to Consolidate, RE 30, PageID#333-335. Accordingly, the District Court refers to Plaintiffs-Appellants as "Lead Plaintiffs" and their case as the "Lead Case". Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#936. The District Court refers to the consolidated plaintiffs as "Member Plaintiffs" and their case as the "Member Case." *Id*., PageID#939.

In its Opinion and Order dated November 25, 2019, the District Court denied Plaintiffs-Appellants' motion for preliminary injunction. Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#926-971; Order Denying Motion for Preliminary Injunction, RE 68, PageID#972-973. Although the District Court correctly held that Plaintiffs-Appellants have standing and that their claims are not barred by laches, Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#943-948, it denied Plaintiffs-Appellants' Motion for Preliminary

Injunction. Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#959.

The District Court said that Plaintiffs-Appellants had not shown that they are likely to succeed on the merits of either their First or Fourteenth Amendment claims, which essentially dictated the other preliminary injunction factors against Plaintiffs-Appellants. *Id*., PageID# 950-959. In doing so, the District Court applied the deferential *Anderson-Burdick* framework to Plaintiffs-Appellants claims. *Id*., PageID#948-57.

Plaintiffs-Appellants now appeal from the denial of their motion for preliminary injunction. Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#926-971; Order Denying Motion for Preliminary Injunction, RE 68, PageID#972-973.

Summary of the argument

The District Court erred as a matter of law in denying Plaintiffs-Appellants' Motion for Preliminary Injunction because it applied incorrect and overly deferential standards to Plaintiffs-Appellants' claims, holding that Plaintiffs were unlikely to succeed on the merits of their claim. These errors fatally infected the entire opinion because the District Court effectively determined that the Plaintiffs-Appellants' failure on the first preliminary injunction factor dictated the results of other factors in Defendants' favor. The District Court's Opinion and Order denying

Plaintiffs-Appellants' Motion for Preliminary injunction should therefore be reversed and this Court should direct that the Motion be granted.

The District Court's principal error is its novel application of the *Anderson-Burdick* standard to this case. It is only through its application of *Anderson-Burdick* that the District Court could determine that Plaintiffs-Appellants were unlikely to succeed on the merits. The *Anderson-Burdick* standard is deferential to state *election administration*, but this case does not concern the administration or the mechanics of elections. Therefore, traditional constitutional standards should have been applied. Those standards show that Plaintiffs-Appellants are likely to succeed on the merits and therefore their motion for preliminary injunction should be granted. The District Court's second error is its misapplication of Plaintiffs-Appellants' equal-protection arguments.

ARGUMENT

In denying Plaintiffs-Appellants' injunction request, the District Court erred as a matter of law. In determining whether to grant a preliminary injunction, a court must balance four factors: "(1) the likelihood that the movant will succeed on the merits; (2) whether the movant will suffer irreparable harm without the injunction; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether public interest will be advanced by issuing the injunction." *Jones v. Caruso*, 569 F.3d 258, 266 (6th Cir. 2009) (citing *Six Clinics*

Holding Corp., II v. Cafcomp Sys., Inc., 119 F.3d 393, 399 (6th Cir. 1997); *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002)).

"As long as there is some likelihood of success on the merits, these factors are to be balanced, rather than tallied." *Hall v. Edgewood Partners Ins. Ctr., Inc.*, 878 F.3d 524, 527 (6th Cir. 2017) (citing *S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir. 2017)). But, "when a party seeks a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits often will be the determinative factor.'" *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 689 (6th Cir. 2014), *cert. denied*, 135 S.Ct. 950 (2015) (quoting *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)). *See also Caruso*, 569 F.3d 258 at 266 (citing *Connection Distrib. Co. v. Reno*, 154 F.3d at 288 (6th Cir. 1998) (in the First Amendment context). "In short, 'because the questions of harm to the parties and the public interest cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation, the crucial inquiry often is . . . whether the [law] at issue is likely to be found constitutional." *Id*. *See also Tumblebus Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005). Moreover, the Third and Fourth factors merge when, as here, the government is a defendant. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

Although this Court generally reviews a decision to deny a Motion for Preliminary Injunction for abuse of discretion, *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 763 (6th Cir. 2019), this Court reviews "legal conclusions *de novo* and its factual findings for clear error." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 540-41 (6th Cir. 2007). So, although there is a generally deferential standard, a district court's decision to deny an injunction must be reversed if it "relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Id*. In this case, the District Court's errors involve all three of these categories, though the latter two are the focus of this appeal.

I. The District Court erred in denying Plaintiffs-Appellants' Motion for Preliminary Injunction because Plaintiffs-Appellants are likely to succeed on the merits of their claims.

To satisfy the first prong of the preliminary injunction analysis, movants are not required to demonstrate that they *will* succeed on the merits at trial, nor are movants required to demonstrate that they will *probably* succeed on the merits of their claims. Plaintiffs-Appellants must only demonstrate that the legal issues they raise are substantial enough to constitute "fair ground[s] for litigation and thus [require] more deliberate investigation." *Roth v. Bank of Commonwealth*, 583 F.2d 527, 537 (6th Cir. 1978) (quoting *Hamilton Watch Co. v. Benrus*, 206 F.2d 738, 740 (2d Cir. 1953)). This Court must only "satisfy itself, not that the plaintiff

certainly has a right, but that he has a fair question to raise as to the existence of such a right." *Brandeis Machinery & Supply Corp. and State Equipment Co., v. Barber-Geene Co.*, 503 F.2d 503, 505 (6th Cir. 1974) (citing *American Federation of Musicians v. Stein*, 213 F.2d 679, 683 (6th Cir. 1954), *cert. denied*, 348 U.S. 873 (1954)).

"It will ordinarily be enough [to warrant an injunction] that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for m[o]re deliberate investigation." *Id*. (error in original) (citing *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2nd Cir. 1953)). When the correct legal standard is applied to the case, Plaintiffs-Appellants' constitutional claims meet the first preliminary injunction factor.

The District Court erred as a matter of law when it determined that Plaintiffs-Appellants had not shown a likelihood of success on the merits of their First or Fourteenth Amendment claims. Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#948-57. The District Court's central error is that it clearly applied an erroneous legal standard—the generally deferential *Anderson-Burdick* test for election-related claims—rather than the traditional First and Fourteenth Amendment standards. Further, the District Court erred in holding that the State's interest in excluding Plaintiffs-Appellants from participation in the

Commission is vital. Once the correct constitutional analyses are applied, Plaintiffs-Appellants are likely to succeed on the merits of their claims.

A. The District Court erred when it applied an erroneous *Anderson-Burdick* framework to this case, which does not concern election administration.

In its Opinion, the District Court applied the *Anderson-Burdick* framework to Plaintiffs-Appellants' claims to determine if they are likely to succeed on the merits. Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#951-955. In doing so, the District Court adopted an incredibly novel argument set forth by Defendant Benson, namely that the commission selection process is more akin to an election than to a hiring process. *Id*., PageID#951-952. Not so. The *Anderson-Burdick* test has no place being applied outside the actual administration of conducting elections. The Supreme Court and this Court have already rejected the contrary argument. Since this case does not involve administration of any election, *Anderson-Burdick* does not apply.

The *Anderson-Burdick* test is a balancing test the Supreme Court articulated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and advanced in *Burdick v. Takushi*, 504 U.S. 428 (1992). Courts use this test as a "flexible standard" when a plaintiff alleges that a state has burdened voting rights in the administration of elections. *E.g*., *Obama for America v. Husted*, 697 F.3d 423, 428-29 (6th Cir. 2012); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 626-627 (6th Cir. 2016).

The *Anderson-Burdick* test allows courts to weigh the character and magnitude of the asserted constitutional injuries against a state's interests in regulating elections. *Id*. Such a test makes perfect sense in adjudicating challenges to election regulations because "voting is of the most fundamental significance under our constitutional structure", *Burdick*, 504 U.S. at 433 (citation omitted), but "government must play an active role in structuring elections" to ensure fairness and honesty and avoid chaos during democratic processes. *Id*. Tension between these two interests arises because election laws "invariably impose some burden upon individual voters." Therefore *Anderson-Burdick* provides a framework for courts to determine when election regulations cross the line.

The *Anderson-Burdick* framework applies to challenges to election laws relating to the *administration of elections*—and *only* to those election laws. *Burdick*, 504 U.S. at 433-34; *Moncier v. Haslam,* 570 Fed. Appx. 553, 559 (6th Cir. 2014); *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, (1997) ("States may, and inevitably must, enact reasonable regulations of *parties*, *elections*, and *ballots* to reduce election- and campaign-related disorder.") (emphasis added) (citing *Burdick*, 504 U.S. at 433); *Crawford v. Marion Cty. Election Bd*., 553 U.S. 181, 204 (2008) (Scalia, J., concurring).

There is no room in the *Anderson-Burdick* framework for considerations of non-election administration related regulations. Indeed, burdens on, or discrimination in, voting rights is the very trigger of the *Anderson-Burdick* test. *See Anderson*, 460 U.S. at 787-789; *Burdick*, 504 U.S. at 423-34; *Crawford*, 553 U.S. at 204 (Scalia, J., concurring) ("To evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in *Burdick* . . . .") (emphasis added), and the state's heightened interests in administering elections, *see* U.S. Const. art. 1, § 4, *Anderson*, 460 U.S. at 787-789; *Burdick*, 504 U.S. at 423-34, *et seq*., are the interests those burdens are balanced against.

This Circuit has already held that *Anderson-Burdick* applies only to laws impacting the administration of candidate elections. In *Moncier v. Haslam*, an individual challenged a plan enacted by the Tennessee General Assembly which governed the selection, evaluation, and retention of judges who serve on the Supreme Court of Tennessee and the state's appellate courts. 570 Fed. Appx. 553, 553-555 (6th Cir. 2014). Under that plan, the Governor temporarily filled judicial vacancies by appointment, but those gubernatorial appointees had to run in a retention election to fulfill the remainder of the unexpired term they were serving. *Id*. The plaintiff in that case challenged the appointment/retention plan, alleging that it violated his and the people of Tennessee's First and Fourteenth Amendment

rights to ballot access and political association. *Id*. That plaintiff relied heavily on *Anderson-Burdick* in pursing his First and Fourteenth Amendment claims. *Id*. at 558.

This Court held that *Anderson-Burdick* offered "no refuge" for the plaintiff because "*Anderson* and *Burdick* presupposed that state law required an election for a particular office in the first place." *Id*. at 559 (citing *Anderson*, 460 U.S. at 782; *Burdick*, 504 U.S. at 430). "Neither case mandated that states *organize their governments in a particular manner* . . . . Nor did either case stipulate when states may deem a particular office vacant or *specify how states must fill those vacancies*." *Moncier* at 559. (emphases added). Accordingly, this Court held that *Anderson* and *Burdick* "bear little weight" on the case. *Id*.

The character of the laws challenged in *Moncier* is parallel to the Commissioner-selection scheme here. They both involve the selection of government employees by state officials without regulating elections of candidates. The character of the challenged law in *Moncier* is the very reason this Court declined to examine it under *Anderson-Burdick*. *Id*. The same holds true here.

The Supreme Court's decision in *McIntyre v. Ohio Elections Commission* is also instructive. 514 U.S. 334 (1995). The complainant in that case challenged under the First Amendment an Ohio law that prohibited the distribution of anonymous campaign literature. *Id*. at 337. The writing in question was a handbill

urging voters to defeat a ballot issue. *Id*. Ohio principally relied on *Anderson-Burdick* to defend its prohibitions and the Ohio Supreme Court applied a similar reasoning in its decision below. *Id*. at 343-344. In reversing the Ohio Supreme Court, the Supreme Court flatly rejected this use of *Anderson-Burdick* outside of an election-law context:

> Unlike the statutory provisions challenged in *Storer* and *Anderson*, § 3599.09(A) of the Ohio Code *does not control the mechanics of the electoral process.* It is a regulation of pure speech. Moreover, even though this provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of speech. . . . Consequently, we are not faced with an ordinary election restriction; this case involves a limitation on political expression subject to exacting scrutiny.

Id. at 345-46. (emphasis added) (internal citations and quotation marks omitted).

So, too, here. The operation of the commissioner disqualification scheme does not involve the "voting process itself" or the "mechanics of the electoral process." *Id*. at 344-45. It involves First Amendment violations in the Commission's selection of its members. *See also Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 493, n. 5 (6th Cir. 1995) (Agreeing with the *McIntyre* decision that the *Anderson-Burdick* standard "is inappropriate to evaluate the constitutionality of a statute that burdens rights protected by the First Amendment."); *Tenn. State Conf. of N.A.A.C.P. v. Hargett*, No. 3:19-cv-00365, 2019 U.S. Dist. LEXIS 156812, *37-39 (M.D. Tenn. Sept. 13, 2019); *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 724-25, (M.D. Tenn. 2019).

Although the Supreme Court and this Court have applied *Anderson-Burdick* to a variety of laws, *see, e.g.*, *Crawford*, 553 U.S. 181 (upholding a voter ID law); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008) (upholding Washington's blanket primary law); *Calif. Democratic Party v. Jones*, 530 U.S. 567 (2000) (striking down California's blanket primary law); *Twin Cities Area New Party*, 520 U.S. 351 (upholding a ban on "fusion" candidates); *Burdick*, 504 U.S. at 434-38 (upholding a prohibition on write-in voting); *Anderson*, 460 U.S. at 788-90 (striking down an early filing deadline for independent candidates); *Obama for America v. Husted*, 697 F.3d 423 (finding Ohio law preventing casting of early ballots by non-military voters violative of Equal Protection Clause); *Ohio Democratic Party v. Husted*, 834 F.3d 620 (upholding early voting law), they have *never* applied it to laws outside of the election administration context directly related to the voting process.

Tellingly, all the cases cited by the District Court and Defendant below supporting the use of the *Anderson-Burdick* standard directly involve the processes, procedures, and apparatuses of voting, rather than the type of underlying First Amendment burdens introduced by the Commission's exclusionary practices. Nevertheless, the District Court opined that *Anderson-Burdick* "provide[s] the better framework for examining the constitutionality of the criteria for membership on a state redistricting commission" due to "the interests at stake" in redistricting

and redistricting commissions. Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#951-952. But courts have never applied the *Anderson-Burdick* test in cases directly involving challenges to redistricting plans or redistricting commissions. *See, e.g.*, *Rucho v. Common Cause*, 139 S. Ct. 2484 (June 27, 2019) (challenge to North Carolina redistricting plan); *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015) (challenge to Arizona independent redistricting commission); *Vieth v. Jubelirer*, 541 U.S. 267, 271-317 (2004) (plurality op.) (challenge to Pennsylvania redistricting plan); *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019) (three-judge panel*), vacating Chatfield v. League of Women Voters*, No. 19-220, 2019 U.S. LEXIS 6515 (Oct. 21, 2019). If the courts do not use the *Anderson-Burdick* test to examine direct challenges to redistricting plans or redistricting commissions directly, how then could they utilize it to examine challenges to selection schemes for redistricting commissioners? *Cf*. Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#951-952. It should not be done and indeed, given the competing interests necessitating the *Anderson-Burdick* test, it cannot be done, regardless of the redistricting "interests at stake". Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#951-952.

The District Court relied heavily on *Citizens for Legislative Choice v. Miller*, 144 F.3d 916 (6th Cir. 1998), which is inapposite. Opinion Denying Motion for

Preliminary Injunction, RE 67, PageID#952, 954. There, a group of voters and public interest groups challenged a Michigan law that imposed lifetime term limits on state legislators. *Citizens for Legislative Choice v. Miller*, 144 F.3d at 918-919. Because the plaintiffs were voters and political groups—not the legislative candidates themselves—they were essentially arguing for a right to *vote* for a specific candidate or class of candidates. This Court held that no such right exists and *Anderson-Burdick* applies due to the *voting rights* implicated. *Id*. at 920-21. In contrast, this case involves free speech and association and how the government is using those characteristics to exclude candidates from a non-elected, government position. Because the law at issue in *Citizens for Legislative Choice* dealt with term limits for elected officials, it truly concerned elections and election administration; not so here, as the Commission's exclusionary requirements involve no elections for the positions at issue. Accordingly, *Anderson-Burdick* is not an appropriate framework to apply here, nor is *Citizens for Legislative Choice*.

B. Traditional First Amendment standards govern the merits analysis in this Case.

Applying a traditional First Amendment analysis to this case shows that Plaintiffs-Appellees are likely to succeed on the merits of their claim. The Commission's exclusionary criteria are over- and under-inclusive rather than narrowly tailored to serve a vital government interest. Accordingly, the criteria are unconstitutional.

1. The Commission excludes categories of individuals based on their exercise of constitutionally protected speech and associations.

Plaintiffs-Appellants are individuals who fall into one or more of the eight categories set forth in Article IV, Section 6(1)(B) and (C) of Michigan's Constitution and therefore are excluded from Commission eligibility based on their exercise (or a family member's exercise) of one or more constitutionally protected interests. These interests include freedom of speech (*e.g.*, by the exclusion of candidates for partisan office or by the activities of certain relatives), right of association (*e.g.*, by the exclusion of members of political parties or by the activities of certain relatives), and/or the right to petition (*e.g.*, by the exclusion of registered lobbyists or by the activities of certain relatives). Each of these rights is well established. For instance, the Supreme Court has made clear that lobbying is a quintessential example of the exercise of the right to petition that is protected by the First Amendment. "In a representative democracy . . . [the] government act[s] on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

The Supreme Court has also previously held that "[t]he First Amendment protects political association as well as political expression" (quoting *Buckley v. Valeo*, 424 U.S. 1, 15 (1976)) and that "[t]he right to associate with the political

party of one's choice is an integral part of this basic constitutional freedom" of association. *Elrod*, 427 U.S. at 357 (plurality op.) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)).

> [P]olitical belief and association constitute the core of those activities protected by the First Amendment. Regardless of the nature of the inducement, whether it be by the denial of public employment or . . . by the influence of a teacher over students, [i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. And . . . . [t]here can no longer be any doubt that 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. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom. These protections reflect our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, a principle itself reflective of the fundamental understanding that [c]ompetition in ideas and governmental policies is at the core of our electoral process.

Elrod, 427 U.S. at 355-58 (internal citations omitted) (some alterations in original).

Moreover, the Supreme Court "has made clear that, even though a person has no 'right' to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act." *Rutan v. Republican Party*, 497 U.S. 62, 86 (1990) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). The government may not deny benefits to people in a way that infringes their constitutionally protected interests, especially freedom of speech. *Rutan* at 86. "For if the

government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. 'This would allow the government to produce a result which [it] could not command directly.'" *Id*. (citing *Speiser*, 357 U.S. at 526) (alteration in original). Such interference with constitutional rights is impermissible. *Id*.

In applying these principles, the Supreme Court has recognized that government positions—such as a Commissioner position here—convey a valuable government benefit. The most obvious of these benefits are specific quantifiable economic benefits. In the present case, each commissioner receives a salary of roughly $40,000 from the State, as noted above. And courts have recognized that quantifiable economic worth is not the only valuable benefit derived from a government position.

These principles were reiterated more recently by the D.C. Circuit in *Autor v. Pritzker*, 740 F.3d 176 (D.C. Cir. 2014), a case that is remarkably akin to the present case. Plaintiffs-Appellants cited *Autor* extensively below, yet that decision is conspicuously absent from the District Court's opinion. In *Autor*, federally registered lobbyists challenged the constitutionality of the President's decision to ban lobbyists from serving on federal-government advisory committees. *Id*. The D.C. Circuit, citing the *Sindermann* line of cases, reversed the district court's

dismissal of the claim and held that the lobbyists pleaded a viable First Amendment unconstitutional-conditions claim by alleging that the government conditioned their eligibility for the valuable benefit of committee membership on their willingness to limit their First Amendment right to petition government. *Id*. at 184. By conditioning Plaintiffs-Appellants' eligibility on their willingness to forgo engaging in First Amendment-protected activity, the Commission does the exact same here. Indeed, even if Plaintiffs-Appellants stopped their own and their relatives' First Amendment activity tomorrow, it would be years before they would be eligible for Commission membership.

The "'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' *even if he has no entitlement to that benefit*." *Bd. of Cty. Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 674 (1996) (emphasis added) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). For instance, while there is no constitutional right to government employment, the government cannot condition employment on the relinquishment of constitutional rights. *See, e.g.*, *Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right.'") (alteration in original) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 n. 10 (1998)); *Connick v. Myers*, 461 U.S. 138, 142 (1983) ("[I]t has been

settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967) and others); *Keyishian*, 385 U.S. at 606 ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon [government employment]." (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

Thus, Plaintiffs-Appellants—who each desire to serve on the Commission but are excluded from consideration—have been denied a benefit. It is through the denial of this benefit that Plaintiffs-Appellants are being punished for no other reason than the exercise of their First Amendment rights, or that of a family member.

2. The Commission's exclusions are unconstitutional because they are both over- and under-inclusive and therefore not narrowly tailored.

The exclusion of Plaintiffs-Appellants from eligibility to serve on the Commission acts as an unconstitutional condition on employment because it is both over- and under-inclusive, rather than narrowly tailored to an adequate government interest.

Conditions of employment that compel or restrain belief and association (*e.g.*, patronage requirements or exclusionary factors based on a person's status within a political party), are inimical to the process which undergirds our system of

government and is "at war with the deeper traditions of democracy embodied in the First Amendment." *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 576 (7th Cir. 1972). The Supreme Court has made clear that "[u]nder [its] sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so." *Rutan*, 497 U.S. at 78. "[T]he government must demonstrate (1) a vital government interest that would be furthered by its political hiring practices; and (2) that the patronage practices are narrowly tailored to achieve that government interest."[3] *Vickery v. Jones*, 856 F. Supp. 1313, 1322 (S.D. Ill. 1994).

A law regulating speech is not narrowly tailored if it fails to advance the government's interests; the law is also not narrowly tailored if it is either over- or under-inclusive, and is not the least restrictive means among available, effective alternatives. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231-32 (2015);

[3] Some courts have applied a strict-scrutiny standard in assessing the constitutionality of laws that burden the right to petition, requiring the government to demonstrate that the challenged law is justified by a "compelling government interest" and that it uses the "least restrictive means" of furthering that interest. *See, e.g.*, *ACLU v. New Jersey Election Law Enforcement Comm.*, 509 F. Supp. 1123, 1129 (D.N.J. 1981). This is a more demanding standard than intermediate scrutiny, which inquires whether the challenged law is "narrowly tailored to serve a significant governmental interest, and . . . leave[s] open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The narrow tailoring element of the intermediate scrutiny test requires that the government's chosen means not be "substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 800.

Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 121-23 (1991). A law regulating speech is over-inclusive if it implicates more speech than necessary to advance the government's interest(s). *Simon & Schuster*, 502 U.S. at 121-23. An under-inclusive law regulates less speech than necessary to advance the government's interest(s). *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

i. The Commission's criteria are both over- and under-inclusive.

Intervening Defendant VNP stated that the relevant government interest here was to create "a fair, impartial, and transparent process where voters - not politicians - will draw Michigan's state Senate, state House, and Congressional election district maps."[4] Regarding the exclusion of the eight categories of individuals from eligibility, VPN explained that "[t]he amendment disqualifies these individuals from serving on the Commission because they are *most likely* to have a conflict of interest when it comes to drawing Michigan's election district maps."[5]

[4] Voters Not Politicians, *We Ended Gerrymandering in Michigan*, https://votersnotpoliticians.com/redistricting.

[5] *Id*. (emphasis added)

The District Court below said these interests in excluding Plaintiffs-Appellants were "compelling". Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#954. But in doing so, it relied, as it so often did in its Opinion, on *Citizens for Legislative Choice*. 144 F.3d at 923. And as explained above, *Citizens for Legislative Choice* is inapplicable and concerns entirely different interests and justifications.

In excluding certain categories of citizens from eligibility based on their exercise of core First Amendment rights, including freedom of speech, right of association, and right to petition the government, the State has unconstitutionally conditioned eligibility for a valuable benefit on a willingness to limit those First Amendment rights. *See Adams v. Governor of Delaware*, 920 F.3d 878 (3d Cir. 2019) (Plaintiff's freedom of association rights were violated by a political balance requirement for Delaware's Supreme Court, Superior Court, and Chancery Court), *cert. granted sub nom., Carney v. Adams*, No. 19-309 (Dec. 6, 2019); *Autor*, 740 F.3d at 179.

The categories are purportedly based on the individual having engaged in activities that reach a certain level of partisanship. In short, the State draws an arbitrary line between certain levels of partisan activity—while some levels of partisan activity are deemed exclusionary (such as being a paid campaign consultant or serving as a precinct delegate), others are not (such as serving as a

volunteer for a recognized party, or serving as a mayor in the City of Detroit elected on a "nonpartisan" basis).[6] Embedded in this arbitrary line drawing is the erroneous assumption that it is only elected officials, candidates, people who have been engaged in other political activities or lobbying, and those somehow tied to them (by family relationships), who have a "personal" or "private" interest in redistricting. These categories are both over- and under-inclusive, regardless of whether the exclusions are designed to eliminate partisanship or private interests. For example, it is impossible to say that the parent of a daughter who is employed by a lobbyist is too partisan to serve but that a volunteer in a political campaign or a "nonpartisan" (but clearly partisan) elected official are not. The exclusionary categories are not narrowly tailored to the government's interest. *Vickery*, 856 F. Supp. 1313 at 1322; *see also* Motion for Preliminary Injunction, RE 4, PageID#77.

The excluded-person categories here are both over- and under-inclusive. For instance, the restriction draws a distinction between registered and unregistered lobbyists, even though the latter lobbying activities may be far more extensive than the former. If the State believes that a lobbyist's financial interest is compellingly

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

implicated by redistricting, there is no logical justification for distinguishing between registered and unregistered lobbyists. Someone in charge of grassroots lobbying for the League of Women Voters of Michigan would not be required to register as a lobbyist and would therefore not be excluded on that basis, while someone employed by Planned Parenthood as a lobbyist in Lansing would be required to register and would therefore be excluded.

Similarly, paid employees of elected officials, political candidates, campaigns, or political action committees are excluded from eligibility, while volunteers are eligible to serve on the Commission.[7] Yet an unpaid volunteer may be *more* likely than a disqualified paid consultant to seek employment from a successful candidate.

Further, although Supreme Court Justices in Michigan are nominated by political parties in an inherently partisan process, current Justices (and those who have served on the Supreme Court in the last six years) are not excluded from eligibility to serve on the Commission, yet the State provides no explanation for the inconsistent treatment between these judges elected in connection with political party operations and other elected officials. Also, bafflingly inconsistent is that township candidates who serve in partisan positions are disqualified but

[7] *See* The Office of Secretary of State Jocelyn Benson, *Commissioner Eligibility Guidelines*, https://www.michigan.gov/sos/0,4670,7-127-1633_91141-501739--,00.html.

"nonpartisan" city candidates are not.[8] So, a member of the Detroit City Council may serve, *even when supported and endorsed by the Democratic Party*, while a Republican trustee of Macomb Township may not serve.

Thus, the Plaintiffs have a strong likelihood of success on the merits because the government interest is not a sufficient fit with the restrictions to justify the distinction the challenged provision draws between Plaintiffs and all other eligible registered voters.

The Commission exclusions are not justified by the stated interests of implementing a "fair, impartial, and transparent redistricting process"[9] either, because excluding Plaintiffs from the Commission cannot be adequately linked to the achievement of those goals. While other aspects of the Commission can logically be connected to those goals (*e.g.*, prohibiting Commissioners from seeking election into the districts they draw, public meetings, publishing of each redistricting proposal, prohibition on *ex parte* communications with

[8] This may have been an intentional design, given that in Michigan the large cities which are dominated by the Democratic Party tend to have "non-partisan" government systems, while smaller community government structures such as townships generally have partisan city councils and mayors, and tend to be controlled by Republican officials. Eric Walcott, *Why are some elections non-partisan*, Michigan State University Extension (Dec. 1, 2017) https://www.canr.msu.edu/news/why_are_some_elections_non_partisan.

[9] Voters Not Politicians, *We Ended Gerrymandering in Michigan*, https://votersnotpoliticians.com/redistricting.

commissioners, prohibition on the acceptance of gifts by the commissioners, requirement of a majority vote for substantive determinations), excluding Plaintiffs from serving on the Commission because of their prior exercise of First Amendment rights cannot.

Perhaps the most startling example of over-inclusiveness is the exclusion of any parent, stepparent, child, stepchild, or spouse of any individual that falls into one of the other excluded categories. There is no basis to disqualify family members, as they bear no relationship to the state's purported interest in eliminating individuals who have engaged in the state political process from redistricting decisions. Indeed, the Michigan Attorney General found unconstitutional a statute that prohibited political contributions by family members (including spouses, parents, children, or spouses of a child) of individuals with interest in a casino enterprise. Mich. Att'y Gen. Adv. Op. 7002 (1998). The Attorney General concluded that the family members "bear no relationship to th[e] state's compelling interest." *Id*.; *see also* SEC Rule 206(4)-5, 17 C.F.R. § 275.206(4)-5 (2010) (excluding spouses from "pay to play" rule prohibiting investment advisors making contributions to government officials that influence government entities to whom they provide services). However the State defines its interest, a familial relationship is insufficient to justify the denial of a citizen of his

or her constitutional rights. And these are but a few examples of the scheme's constitutional shortcomings.

Below, Defendants argued that Plaintiffs-Appellants are excluded from serving on the Commission because they are the "most likely" to have a conflict of interest in the redistricting process, and the District Court appeared to adopt this argument. This assertion erroneously assumes that it is only elected officials and candidates, people who have been engaged in various political activities or lobbying, and those somehow tied to them, that have a personal and passionate interest in the outcome of redistricting. Further, there are no mechanisms to identify and eliminate from consideration applicants who are extremely partisan in nature but do *not* fall into one of the banned categories. The Commission's application process provides a system of self-identified "affiliation" (or lack of affiliation) yet provides no definition of "affiliation" and no mechanism for the state to determine if an individual has accurately and truthfully designated his or her affiliation.

Michigan is one of many states that does not maintain voter registration based on political party. So, there is no assurance that an applicant has appropriately declared his or her true political biases, allowing for unchecked manipulation of the system and thus undermining the stated goals of transparency and impartiality. The result is a stark and inappropriate disparity in treatment

between the Plaintiffs-Appellants and the vast numbers of citizens who are equally personally invested in the outcome of the redistricting process, but eligible to serve as a commissioner.

Most important, it is inappropriate to single out Plaintiffs based on perceived impartiality because the Commission itself is not designed to be impartial or non-partisan. Rather, it is designed to be an amalgam of a variety of views across the political spectrum. That Plaintiffs-Appellants' participation is somehow constitutionally justified because it will undermine the "impartiality" of a Commission that necessarily includes a variety of views, including self-declared partisan ones, is unsupportable. There is no compelling explanation from the State or District Court as to how Plaintiffs-Appellants' exercise of their First Amendment rights would result in a Commission with less impartiality than a Commission that includes individuals who hold strong political views that are just as strong—or perhaps even stronger—but do not happen to fall into to one of the excluded categories of people.

Thus, the government has no legitimate basis to condition Plaintiffs-Appellants' eligibility to serve as Commissioner on their agreement to forgo constitutionally protected activities – and to have refrained from such activities for years prior to the ballot measure even being proposed – or to penalize them for having family members who exercised those same rights. This categorical

exclusion of Plaintiffs-Appellants from serving on the Commission attaches an unconstitutional condition on eligibility because the State may not deny a benefit to a person on a basis that infringes his or her constitutionally protected rights.

ii. The Commission's criteria violate Equal Protection.

The Commission's exclusionary criteria also violate the Equal Protection Clause for many of the same reasons that they violate the First Amendment. The criteria burden only individuals that fall into set categories because of an exercise of their First Amendment rights (or their family members' exercise of such rights), while imposing no restriction on individuals who may be just as partisan, or more partisan.

The District Court dedicated no more than a paragraph to its analysis of Plaintiffs-Appellants' Equal Protection claim. Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#956-957. It held that because Plaintiffs-Appellants "do not belong to any suspect classification such as race or religion" the state need only meet rational basis, which it held it likely does in this case. *Id*. This was also error.

As the Supreme Court stated in *Police Dep't of Chicago v. Mosley*, and unlike Equal Protection cases involving protected and non-protected classes, "[t]he Equal Protection Clause requires that statutes *affecting First Amendment interests* be narrowly tailored to their legitimate objectives." 408 U.S. 92, 101 (1972)

(emphasis added). The Commission's exclusionary criteria fails this standard. The exclusion scheme draws an unconstitutional distinction between those who exercise their rights of association and rights to petition the government and those who do not. The exclusions penalize some individuals who engage in lobbying but impose no sanction at all on other individuals whose "lobbying" activities are much more extensive than those subject to the policy, but who may structure their time so as not to cross registration thresholds.

Further, the Secretary of State has explained in her guidance that paid employees of an elected official, political candidate, campaign, or political action committee are excluded from eligibility, but volunteers are eligible to serve on the Commission because they are not paid for their services.[10] Those same guidelines state that any individual serving as a paid consultant or employee of a non-partisan elected official, non-partisan political candidate, or nonpartisan local political candidate's campaign since August 15, 2014 may not be eligible to serve on the Commission. *Id*. Conversely, although Supreme Court Justices in Michigan are nominated by political parties in an inherently partisan process, they are not excluded from eligibility to serve on the Commission. *Id*. These are but a few

[10] *See* The Office of Secretary of State Jocelyn Benson, *Commissioner Eligibility Guidelines*, https://www.michigan.gov/sos/0,4670,7-127-1633_91141-501739--,00.html.

examples of the irrational and constitutionally infirm exclusionary categories created by the Amendment.

Accordingly, the classifications on which the exclusionary commissioner selection criteria is based is not meaningfully tied to apparent State interests in promoting transparency, fairness, and impartiality in the redistricting process, and is certainly not narrowly tailored thereto.

By excluding certain categories of citizens from eligibility based on their exercise of core First Amendment rights—including freedom of speech, right of association, and right to petition the government—and failing to narrowly tailor the constitutional provisions to a compelling interest, the State has violated the First and Fourteenth Amendments by unconstitutionally conditioning eligibility for a valuable benefit on Plaintiffs' willingness to limit their First Amendment rights. For these reasons, the Plaintiffs-Appellants have been and will continue to be unconstitutionally deprived of their First Amendment rights and the equal protection of the law.

3. The entire Commission should be declared invalid because the unconstitutional provisions are not severable from the rest of the Amendment.

When the correct legal standards are applied, Plaintiffs-Appellees are not only likely to succeed on the merits of their constitutional challenge to the specific

exclusionary provisions of the Michigan constitution, but there is a strong likelihood that the entire Commission scheme will be declared invalid.[11]

The Amendment itself contains a severability clause:

> This section is self-executing. If a final court decision holds any part or parts of this section to be in conflict with the united states constitution or federal law, the section shall be implemented to the maximum extent that the united states constitution and federal law permit. Any provision held invalid is severable from the remaining portions of this section.

Mich. Const. art. IV, § 6(20) (capitalization in original). Notwithstanding this clause, this Court must still determine whether the offending provisions of a law may be severed or if doing so would upset the will of the enactors. *In re request for Advisory Op. Regarding Constitutionality of 2011 PA 38*, 806 N.W.2d 683, 713-14 (Mich. 2011); *People v. McMurchy*, 228 N.W. 23, 727 (Mich. 1930); Mich. Att'y Gen. Op. No. 7309 (2019).

In examining severability, the Michigan Supreme Court has focused on whether severing a particular provision "is not inconsistent with the manifest intent of the legislature[.]"*Constitutionality of 2011 PA 38*, 806 N.W. 2d at 714 (quoting nearly identical severability language from Mich. Comp. Laws § 8.5) (citing

[11] Plaintiffs-Appellants argued against severability and therefore in favor of invalidating the entire Commission below, but because the District Court erroneously determined that Plaintiffs-Appellants were not likely to succeed on the merits of their constitutional claims, it declined to address the effect of the severability provision. Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#957, n. 4.

Eastwood Park Amusement Co. v. East Detroit Mayor, 38 N.W. 2d 77, 81 (Mich. 1949)). Relevant factors in making this determination include indications that the legislature intended a different severability rule to apply, the remedy requested by the Attorney General, and evidence that the legislature would have adopted the statute even with the knowledge that provisions could be severed. *Constitutionality of 2011 PA 38*, 806 N.W. 2d at 713. This Court has explained that "the law remaining after an invalid portion of the law is severed will be enforced independently 'unless the invalid provisions are deemed so essential, and are so interwoven with others, that it cannot be presumed that the legislature intended the statute to operate otherwise than as a whole.'" *Garcia v. Wyeth-Ayerst Labs*, 385 F.3d 961, 967 (6th Cir. 2004) (quoting *Moore v. Fowinkle*, 512 F.2d 629, 632 (6th Cir. 1975)).

Applying these standards to a constitutional amendment approved by voters through a ballot proposal is challenging because there is little indication of intent, as there is in a legislative record. There is no comparable record of amendments or debate for a successful ballot initiative beyond the binary vote on election day. Accordingly, when in doubt, courts often presume that ballot provisions are not severable, leaving it to future voters to decide whether they want to keep a ballot measure that is missing invalidated provisions.

For example, in *In re Apportionment of State Legislature-1982*, 321 N.W.2d 565 (Mich. 1982), the Michigan Supreme Court was tasked with deciding whether Michigan's legislative redistricting commission could function under a set of standards different from those initially adopted at a state constitutional convention (since the first standards were deemed unconstitutional by the United States Supreme Court in *Marshall v. Hare*, 378 U.S. 561 (1964)). The court ruled the standards were not severable and that the whole regulatory regime had to be struck. Holding otherwise would have required the court to opine on whether the people would have voted for the commission without the standards subsequently found to be unconstitutional. Such a decision properly belonged to the people of Michigan and not to the court. *In re Apportionment of State Legislature-1982*, 321 N.W.2d at 138. No one "can . . . predict what the voters would do if presented with the severability question at a general election . . . . The people may prefer to have the matter returned to the political process or they may prefer plans drawn pursuant to the guidelines which are delineated in this opinion." *Id*. at 137.

Similarly, in *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713 (1964), Colorado voters approved an amendment to their state constitution that reapportioned state senate districts on a basis that the Supreme Court subsequently deemed unconstitutional. *Id*. at 717. The Court, ruling on the question of severability, struck down the entire amendment—including the constitutionally

permissible population-based apportionment of the state house—because "there is no indication that the apportionment of the two houses of the Colorado General Assembly . . . is severable." *Id*. at 735.

Likewise, in *Randall v. Sorrell*, 548 U.S. 230, 262 (2006), the Supreme Court struck down an entire Vermont campaign finance statute after determining that the law's contribution limits violated the First Amendment. The majority determined that severing the unconstitutional provisions "would [have] require[d] us to write words into the statute . . . or to foresee which of many different possible ways the legislature might respond to the constitutional objections we have found." *Id*.

In making this severability inquiry, the fundamental question is intent. In *Minnesota. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), the Supreme Court assumed for the purpose of the decision that statutory severability standards applied to the constitutional analysis of executive orders. In ruling against severability, the Court affirmed that a severability inquiry "is essentially an inquiry into . . . intent," and proceeded to analyze the executive order by assessing the President's intentions in signing it. *Id*. at 191 (citing *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality op.).

Here, Ballot Proposal 2's wording specifically states that the proposed amendment would "[p]rohibit partisan officeholders and candidates, their

employees, certain relatives, and lobbyists from serving as commissioners."[12] Further, the language of the accompanying draft amendments, which were provided to voters with the ballot proposal provided specific details of the exact categories of individuals that would be ineligible to serve on the Commission.[13] Consequently, the voters were aware of the specific categories of individuals that were deemed to be "too partisan" in nature, and thus excluded from eligibility in order to accomplish the stated objective of "prohibit[ing] partisan[s] . . . from serving as commissioners." Michigan Board of State Canvassers, *Official Ballot Wording approved by the Board of State Canvassers August 30, 2018 Voters Not Politicians*, https://www.michigan.gov/documents/sos/Official_Ballot_Wording_Prop_18-2_632052_7.pdf. In voting yes on the proposal, voters believed that such restrictions were a vital part of the overall proposal and thus not severable. To the extent the voters' intent is ambiguous, this Court should follow the lead of the Michigan and U.S. Supreme Courts and presume that the measure would not have passed but for the inclusion of the exclusionary criteria.

---

[12] Michigan Board of State Canvassers, *Official Ballot Wording approved by the Board of State Canvassers August 30, 2018 Voters Not Politicians*, https://www.michigan.gov/documents/sos/Official_Ballot_Wording_Prop_18-2_632052_7.pdf.

[13] *Id*.

Further, the exclusionary factors play an essential role in accomplishing the goal that the Commission was designed to achieve—and in VNP's campaign to persuade voters to adopt Proposal 18-2—and therefore is so interwoven with the other provisions, it cannot be presumed that voters would have intended the Commission to exist without those provisions. *See Wyeth-Ayerst Labs*, 385 F.3d at 967. The State explained that the "people of Michigan" created the Commission to "combat the effects of 'excessive partisanship'" and "[t]he composition and selection of its members was designed to eliminate undue political influence in the drawing of district lines" and it "does so by rendering [individuals] ineligible to serve on the Commission." Opposition to Preliminary Injunction, RE 39, PageID#532-533. Thus, by Defendant's own admission, the exclusionary factors are essential to the Commission's intended functioning.

This intent was embodied in the ballot proposal's summary, which stated that the proposed amendment would "[p]rohibit partisan officeholders and candidates, their employees, certain relatives, and lobbyists from serving as commissioners". Michigan Board of State Canvassers, *Official Ballot Wording approved by the Board of State Canvassers August 30, 2018 Voters Not Politicians*,

https://www.michigan.gov/documents/sos/Official_Ballot_Wording_Prop_18-2_632052_7.pdf. The language of the accompanying draft amendments provided

specific details of the exact categories of individuals that would be ineligible to serve on the Commission. *Id*. The voters were aware of the specific categories of individuals that were excluded from eligibility in order to accomplish the stated objective of "prohibit[ing] partisan[s] . . . from serving as commissioners," and the courts should assume that these exclusions mattered to voters. *Id*.

In sum, there is a strong likelihood that Plaintiffs-Appellants will be successful not only in invalidating the Commission's selection criteria but also the Commission in its entirety because it is not possible to say that Michigan voters would have approved the ballot measure but for VNP's decision to include unconstitutional commissioner criteria.

C. Plaintiffs-Appellants are likely to succeed on the merits of their claims.

For the foregoing reasons, when the correct First and Fourteenth Amendment standards are applied to their claims, Plaintiffs-Appellants have a strong likelihood of success on the merits. Accordingly, the first and most important preliminary injunction factor weighs heavily in Plaintiffs-Appellants' favor.

II. The District Court erred in holding that Plaintiffs-Appellees' injuries are not irreparable absent an injunction.

The District Court also erred as a matter of law in holding that Plaintiffs-Appellees' constitutional harms are not irreparable absent an injunction. Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#958. The harms

analysis was driven entirely by the District Court's conclusion that Plaintiffs-Appellants were unlikely to prevail on the merits of their constitutional claims, and so Plaintiffs-Appellants would not suffer irreparable harm absent an injunction. *Id*. When the proper First Amendment framework is applied to Plaintiffs-Appellants' claims instead of *Anderson-Burdick*, it is clear that Plaintiffs-Appellants' First and Fourteenth Amendment rights are not only threatened but are currently being injured by their prohibition from eligibility to serve on the commission. That swings this factor in Plaintiffs-Appellants' direction.

It is well-settled that even minimal loss of First Amendment freedoms "unquestionably constitutes irreparable injury." *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (quoting *Elrod*, 427 U.S. at 373); *Elrod*, 427 U.S. at 373; *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989). *Accord, e.g.*, *Bonnell v. Lorenzo*, 241 F.3d 800, 809-10 (6th Cir. 2001); *Schicke v. Dilger*, No. 17-6456, 2017 U.S. App. Lexis 27024 *6-7 (6th Cir. Dec. 28, 2017). *See also N.Y. Times v. United States*, 403 U.S. 713, 715 (1971). Further, these rights need only be *threatened* to constitute irreparable harm. In *Elrod*, the Supreme Court affirmed the Court of Appeals decision to grant a preliminary injunction where individuals were merely threatened with dismissal based on their lack of patronage for the political party in power. The Court noted:

> [a]t the time a preliminary injunction was sought in the District Court, one of the respondents was only threatened with discharge. In

> addition, many of the members of the class respondents were seeking to have certified prior to the dismissal of their complaint were threatened with discharge or had agreed to provide support for the Democratic Party in order to avoid discharge. It is clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought.

427 U.S. at 373. Under those circumstances, the Court agreed with the Court of Appeals holding that "[i]nasmuch as this case involves First Amendment rights of association which must be carefully guarded against infringement by public office holders, we judge that injunctive relief is clearly appropriate in these cases." *Id*. (citing *Burns v. Elrod*, 509 F.2d 1133, 1136 (7th Cir. 1975)). The Court further stated that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id*. at 373-74 (citing *N.Y. Times*, 403 U.S. 713).

Here, Plaintiffs-Appellants are *already* being excluded from eligibility based on their exercise of constitutionally protected activity. Far from a minimal burden, Plaintiffs-Appellants are being banned from consideration and eligibility for participation in the Commission only because of their exercise of First Amendment rights. Without injunctive relief, Plaintiffs-Appellants' injury will continue.

Accordingly, Plaintiffs-Appellants will suffer irreparable injury absent an injunction and this factor balances heavily in Plaintiffs-Appellants' favor. The District Court, therefore, erred as a matter of law in holding to the contrary.

III. The District Court erred in holding that granting the injunction would substantially injure others and not further the public interest.

Regarding injury to others and the public interest, the District Court again deferred to its erroneous conclusion that Plaintiffs-Appellants were unlikely to prevail—"the public interest lies in a correct application of the federal constitutional and statutory provisions upon which the claimants have brought this claim . . ."—and stated its belief that the status quo lies with enforcement of the Commissioner selection protocol. Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#959, (quoting *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006)); *Id*. Again, a proper merits analysis flips these factors.

In cases where harms are claimed on both sides, the Court should look to the merits. The primary factor showing irreparable harm to Plaintiffs-Appellants through the denial of their constitutional rights also shows why the public interest is furthered by an injunction. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (noting that the irreparable harm and public interest "merge" when the government is a party). "[T]he public interest lies in a correct application of the federal constitutional and statutory provisions upon which the claimants have brought this claim and ultimately. . . upon the will of the people of Michigan being effected in accordance with Michigan law." *Coalition to Defend Affirmative Action*, 473 F.3d at 252 (internal quotation and citation omitted).

In the present case, the public interest favors issuance of a preliminary injunction for reasons similar to those discussed with respect to the other preliminary injunction factors: "[E]nforcement of an unconstitutional law is always contrary to the public interest." *Pursuing Am.'s Greatness v. F.E.C.*, 831 F.3d 500, 511 (D.C. Cir. 2016) (quoting *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)). *See also League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action."). There is in fact a "substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations.'" *League of Women Voters*, 838 F.3d at 12 (citing *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)). This is because "it may be assumed that the Constitution is the ultimate expression of the public interest," *Gordon*, 721 F.3d at 653 (quotation marks omitted) (quoting *Llewlyn v. Oakland Cty. Prosecutor's Office*, 402 F. Supp. 379, 1393 (E.D. Mich. 1975)). The public interest is served by ensuring that the defendant does not irrevocably offend that document while this case is being litigated.

Further, a preliminary injunction will avoid possible disruption of the redistricting process and will avoid the diversion of limited state funds and other resources to a redistricting process that will eventually be declared constitutionally invalid. Though applications to serve on the Commission are not due until June,

2020, *see* Mich. Const. art 4 § 6(2)(F), the Secretary of State has already begun preparations for the Commission, including launching a web portal for individuals to learn more about the Commission and to apply to be Commissioners.[14] Soon, the Michigan Secretary of State will expend a significant amount of resources to mail applications to at least 10,000 randomly selected registered voters encouraging them to apply. Mich. Const. art 4, § 6(2)(A). The selection process will be completed no later than September 1, 2020. *Id*.; *Id*. at § 6(2)(A), (C). Thus, the public interest lies in avoiding this potentially wasteful use of limited State resources.

Accordingly, the District Court erred as a matter of law in adjudicating each of the preliminary injunction factors and Plaintiffs-Appellants are entitled to a preliminary injunction.

IV. This Court should reverse and direct the District Court to grant Plaintiffs an injunction.

Plaintiffs-Appellants ask this Court to not only reverse the decision of the District Court, but also to remand with instructions to grant Plaintiffs-Appellants' Motion for Preliminary Injunction.

Generally, panels "entertaining a preliminary injunction appeal decide[] only whether the district court abused its discretion in ruling on the request for relief

[14] The Office of Secretary of State Jocelyn Benson, *Commissioner Eligibility Guidelines*, https://www.michigan.gov/sos/0,4670,7-127-1633_91141---,00.html.

and do[] not go into the merits any further than necessary to determine whether the moving party established a likelihood of success." *Jones v. Caruso*, 569 F.3d 258, 269 (6th Cir. 2009) (quoting *Rogers v. Corbett*, 468 F.3d 188, 192 (3d Cir. 2006)). (citations omitted). "However, 28 U.S.C. § 1292(a)(1), which governs appeals of interlocutory orders granting or denying injunctions, provides courts of appeal with jurisdiction to reach the merits, at least where there are no relevant factual disputes and the matters to be decided are closely related to the interlocutory order being appealed." *Jones*, 569 F.3d at 269 (citations omitted). Indeed, there are many instances of appellate Courts doing just that. *See, e.g.*, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986) (noting that appellate review on the merits of the issuance of an injunction is proper "if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance[.]"); *Jones*, 569 F.3d at 269-270 (on interlocutory appeal from a district court's denial of a preliminary injunction, this Court reviewed the merits of the motion because the record in that case contained the necessary facts); *Doe v. Sundquist*, 106 F.3d 702, 707-08 (6th Cir. 1997) (finding that reaching the merits was "in the interest of judicial economy," since "the legal issues have been briefed and the factual record does not need expansion" (citations omitted)); *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1256-57 (11th Cir. 2004) (on interlocutory appeal from the district court's denial of a

preliminary injunction, the court determined that the appeal presented pure questions of law and struck down the county's permitting requirement for public demonstrations on First Amendment grounds); *ACLU v. Mukasey*, 534 F.3d 181, 187-88 (3d Cir. 2008) (noting that "[i]f a preliminary injunction appeal presents a question of law and the facts are established or of no controlling relevance, the panel may decide the merits of the claim") (quoting *Pitt News v. Pappert*, 379 F.3d 96, 104-05 (3d Cir. 2004)).

The record in this case contains the facts necessary to decide whether Plaintiffs-Appellants' claims warrant an injunction of the Commission; the "pertinent facts are primarily drawn from the content of the constitutional language", Opinion Denying Motion for Preliminary Injunction, RE 67, PageID#928; and all "parties agree that the propriety of preliminary injunctive relief turns on questions of law, not any contested facts", *id*. In addition, because the Commission application process begins on January 1, 2020, time is of the essence. For all these reasons, this Court should review the merits of Plaintiffs-Appellants' Motion for Preliminary Injunction pursuant to 28 U.S.C. § 1292(a)(1).

CONCLUSION

No government may condition eligibility for employment on an applicant's willingness to give up constitutionally protected speech and associational activities. That prohibition applies double when the government excludes

applicants based on the protected speech and associational activities of an applicant's family members. The Founders would be astonished at the brazen attempt to bar someone from a government position simply because they have a parent or child who happens to work for the wrong person. All of the Commission's eligibility exclusions are unconstitutional.

What's more, it is not at all clear that Michigan voters would have approved a ballot initiative without the unconstitutional exclusions. Notwithstanding the proposal's attempt to insulate itself from a severability analysis, the Court should hold that the eligibility requirements are not severable.

Accordingly, Plaintiffs-Appellants respectfully request that this Court reverse the decision of the District Court and direct the District Court to grant Plaintiffs-Appellants' Motion for Preliminary Injunction.

/s/ Jason Torchinsky
Jason Torchinsky
Jonathan P. Lienhard
Shawn Sheehy
Dennis W. Polio
Holtzman Vogel Josefiak
Torchinsky PLLC
45 N. Hill Drive, Suite 100
Warrenton, VA 20186
P: (540) 341-8808
F: (540) 341-8809
jtorchinsky@hvjt.law
jlienhard@hvjt.law
ssheehy@hvjt.law
dwpolio@hvtj.com

John J. Bursch
Bursch Law
9339 Cherry Valley, S.E., Suite 78
Caledonia, MI 49316
616-450-4235

Eric E. Doster
DOSTER LAW OFFICES, PLLC
2145 Commons Parkway
Okemos, MI 48864
(517) 977-0147
eric@ericdoster.com

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 6 Cir. R. 32(b) because it contains 12,270 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

By: /s/ Jason Torchinsky
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2020, an electronic copy of the foregoing Correct Opening Brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Sixth Circuit, using the appellate CM/ECF system. I further certify that all parties in this case are represented by lead counsel who are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

By: /s/ Jason Torchinsky
Attorney for Appellants

ADDENDUM

TABLE OF CONTENTS

DESIGNATION OF RELEVANT LOWER-COURT DOCUMENTS

RE	Description	Page ID #
1	Complaint	1-32
4	Motion for Preliminary Injunction	53-92
27	Motion to Consolidate	314-319
30	Order Granting Motion to Consolidate	333-335
39	Opposition to Preliminary Injunction	532-533
67	Opinion Denying Motion for Preliminary Injunction	926-971
68	Order Denying Motion for Preliminary Injunction	972-973
71	Notice of Appeal	980-981

STATE CONSTITUTION (EXCERPT)
CONSTITUTION OF MICHIGAN OF 1963

§ 6 Independent citizens redistricting commission for state legislative and congressional districts.

Sec. 6. (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.

(e) For five years after the date of appointment, a commissioner is ineligible to hold a partisan elective office at the state, county, city, village, or township level in Michigan.

(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. The secretary of state shall circulate the applications in a manner that invites wide public participation from different regions of the state. The secretary of state shall also mail applications for commissioner to ten thousand Michigan registered voters, selected at random, by 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.

(b) Subject to part (2)(c) of this section, the secretary of state shall mail additional applications for commissioner to Michigan registered voters selected at random until 30 qualifying applicants that affiliate with one of the two major parties have submitted applications, 30 qualifying applicants that identify that they affiliate with the other of the two major parties have submitted applications, and 40 qualifying applicants that identify that they do not affiliate with either of the two major parties have submitted applications, each in response to the mailings.

(c) The secretary of state shall accept applications for commissioner until June 1 of the year of the federal decennial census.

(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.

(3) Except as provided below, commissioners shall hold office for the term set forth in part (18) of this section. If a commissioner's seat becomes vacant for any reason, the secretary of state shall fill the vacancy by randomly drawing a name from the remaining qualifying applicants in the selection pool from which the original commissioner was selected. A commissioner's office shall become vacant upon the occurrence of any of the following:

(a) Death or mental incapacity of the commissioner;

(b) The secretary of state's receipt of the commissioner's written resignation;

(c) The commissioner's disqualification for election or appointment or employment pursuant to article XI, section 8;

(d) The commissioner ceases to be qualified to serve as a commissioner under part (1) of this section; or

(e) After written notice and an opportunity for the commissioner to respond, a vote of 10 of the commissioners finding substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office.

(4) The secretary of state shall be secretary of the commission without vote, and in that capacity shall furnish, under the direction of the commission, all technical services that the commission deems necessary. The commission shall elect its own chairperson. The commission has the sole power to make its own rules of procedure. The commission shall have procurement and contracting authority and may hire staff and consultants for the purposes of this section, including legal representation.

(5) Beginning no later than December 1 of the year preceding the federal decennial census, and continuing each year in which the commission operates, the legislature shall appropriate funds sufficient to compensate the commissioners and to enable the commission to carry out its functions, operations and activities, which activities include retaining independent, nonpartisan subject-matter experts and legal counsel, conducting hearings, publishing notices and maintaining a record of the commission's proceedings, and any other activity necessary for the commission to conduct its business, at an amount equal to not less than 25 percent of the general fund/general purpose budget for the secretary of state for that fiscal year. Within six months after the conclusion of each fiscal year, the commission shall return to the state treasury all moneys unexpended for that fiscal year. The commission shall furnish reports of expenditures, at least annually, to the governor and the legislature and shall be subject to annual audit as provided by law. Each commissioner shall receive compensation at least equal to 25 percent of the governor's salary. The State of Michigan shall indemnify commissioners for costs incurred if the legislature does not appropriate sufficient funds to cover such costs.

(6) The commission shall have legal standing to prosecute an action regarding the adequacy of resources provided for the operation of the commission, and to defend any action regarding an adopted plan. The commission shall inform the legislature if the commission determines that funds or other resources provided for operation of the commission are not adequate. The legislature shall provide adequate funding to allow the commission to defend any action regarding an adopted plan.

(7) The secretary of state shall issue a call convening the commission by October 15 in the year of the federal decennial census. Not later than November 1 in the year immediately following the federal decennial census, the commission shall adopt a redistricting plan under this section for each of the following types of districts: state senate districts, state house of representative districts, and congressional districts.

(8) Before commissioners draft any plan, the commission shall hold at least ten public hearings throughout the state for the purpose of informing the public about the redistricting process and the purpose and responsibilities of the commission and soliciting information from the public about potential plans. The commission shall receive for consideration written submissions of proposed redistricting plans and any supporting materials, including underlying data, from any member of the public. These written submissions are public records.

(9) After developing at least one proposed redistricting plan for each type of district, the commission shall publish the proposed redistricting plans and any data and supporting materials used to develop the plans. Each

commissioner may only propose one redistricting plan for each type of district. The commission shall hold at least five public hearings throughout the state for the purpose of soliciting comment from the public about the proposed plans. Each of the proposed plans shall include such census data as is necessary to accurately describe the plan and verify the population of each district, and a map and legal description that include the political subdivisions, such as counties, cities, and townships; man-made features, such as streets, roads, highways, and railroads; and natural features, such as waterways, which form the boundaries of the districts.

(10) Each commissioner shall perform his or her duties in a manner that is impartial and reinforces public confidence in the integrity of the redistricting process. The commission shall conduct all of its business at open meetings. Nine commissioners, including at least one commissioner from each selection pool shall constitute a quorum, and all meetings shall require a quorum. The commission shall provide advance public notice of its meetings and hearings. The commission shall conduct its hearings in a manner that invites wide public participation throughout the state. The commission shall use technology to provide contemporaneous public observation and meaningful public participation in the redistricting process during all meetings and hearings.

(11) 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.

The commission, its members, staff, attorneys, experts, and consultants may not directly or indirectly solicit or accept any gift or loan of money, goods, services, or other thing of value greater than $20 for the benefit of any person or organization, which may influence the manner in which the commissioner, staff, attorney, expert, or consultant performs his or her duties.

(12) Except as provided in part (14) of this section, a final decision of the commission requires the concurrence of a majority of the commissioners. A decision on the dismissal or retention of paid staff or consultants requires the vote of at least one commissioner affiliating with each of the major parties and one non-affiliating commissioner. All decisions of the commission shall be recorded, and the record of its decisions shall be readily available to any member of the public without charge.

(13) The commission shall abide by the following criteria in proposing and adopting each plan, in order of priority:

(a) Districts shall be of equal population as mandated by the United States constitution, and shall comply with the voting rights act and other federal laws.

(b) Districts shall be geographically contiguous. Island areas are considered to be contiguous by land to the county of which they are a part.

(c) Districts shall reflect the state's diverse population and communities of interest. Communities of interest may include, but shall not be limited to, populations that share cultural or historical characteristics or economic interests. Communities of interest do not include relationships with political parties, incumbents, or political candidates.

(d) Districts shall not provide a disproportionate advantage to any political party. A disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness.

(e) Districts shall not favor or disfavor an incumbent elected official or a candidate.

(f) Districts shall reflect consideration of county, city, and township boundaries.

(g) Districts shall be reasonably compact.

(14) The commission shall follow the following procedure in adopting a plan:

(a) Before voting to adopt a plan, the commission shall ensure that the plan is tested, using appropriate technology, for compliance with the criteria described above.

(b) Before voting to adopt a plan, the commission shall provide public notice of each plan that will be voted on and provide at least 45 days for public comment on the proposed plan or plans. Each plan that will be voted on shall include such census data as is necessary to accurately describe the plan and verify the population of each district, and shall include the map and legal description required in part (9) of this section.

(c) A final decision of the commission to adopt a redistricting plan requires a majority vote of the commission, including at least two commissioners who affiliate with each major party, and at least two commissioners who do not affiliate with either major party. If no plan satisfies this requirement for a type of district, the commission shall use the following procedure to adopt a plan for that type of district:

(i) Each commissioner may submit one proposed plan for each type of district to the full commission for consideration.

(ii) Each commissioner shall rank the plans submitted according to preference. Each plan shall be assigned a point value inverse to its ranking among the number of choices, giving the lowest ranked plan one point and

the highest ranked plan a point value equal to the number of plans submitted.

(iii) The commission shall adopt the plan receiving the highest total points, that is also ranked among the top half of plans by at least two commissioners not affiliated with the party of the commissioner submitting the plan, or in the case of a plan submitted by non-affiliated commissioners, is ranked among the top half of plans by at least two commissioners affiliated with a major party. If plans are tied for the highest point total, the secretary of state shall randomly select the final plan from those plans. If no plan meets the requirements of this subparagraph, the secretary of state shall randomly select the final plan from among all submitted plans pursuant to part (14)(c)(i).

(15) Within 30 days after adopting a plan, the commission shall publish the plan and the material reports, reference materials, and data used in drawing it, including any programming information used to produce and test the plan. The published materials shall be such that an independent person is able to replicate the conclusion without any modification of any of the published materials.

(16) For each adopted plan, the commission shall issue a report that explains the basis on which the commission made its decisions in achieving compliance with plan requirements and shall include the map and legal description required in part (9) of this section. A commissioner who votes against a redistricting plan may submit a dissenting report which shall be issued with the commission's report.

(17) An adopted redistricting plan shall become law 60 days after its publication. The secretary of state shall keep a public record of all proceedings of the commission and shall publish and distribute each plan and required documentation.

(18) The terms of the commissioners shall expire once the commission has completed its obligations for a census cycle but not before any judicial review of the redistricting plan is complete.

(19) The supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their respective duties, may review a challenge to any plan adopted by the commission, and shall remand a plan to the commission for further action if the plan fails to comply with the requirements of this constitution, the constitution of the United States or superseding federal law. In no event shall any body, except the independent citizens redistricting commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state.

(20) This section is self-executing. If a final court decision holds any part or parts of this section to be in conflict with the United States constitution or federal law, the section shall be implemented to the maximum extent that the United States constitution and federal law permit. Any provision held invalid is severable from the remaining portions of this section.

(21) Notwithstanding any other provision of law, no employer shall discharge, threaten to discharge, intimidate, coerce, or retaliate against any employee because of the employee's membership on the commission or attendance or scheduled attendance at any meeting of the commission.

(22) Notwithstanding any other provision of this constitution, or any prior judicial decision, as of the effective date of the constitutional amendment adding this provision, which amends article IV, sections 1 through 6, article V, sections 1, 2 and 4, and article VI, sections 1 and 4, including this provision, for purposes of interpreting this constitutional amendment the people declare that the powers granted to the commission are legislative functions not subject to the control or approval of the legislature, and are exclusively reserved to the commission. The commission, and all of its responsibilities, operations, functions, contractors, consultants and employees are not subject to change, transfer, reorganization, or reassignment, and shall not be altered or abrogated in any manner whatsoever, by the legislature. No other body shall be established by law to perform functions that are the same or similar to those granted to the commission in this section.

History: Const. 1963, Art. IV, § 6, Eff. Jan. 1, 1964;—Am. Init., approved Nov. 6, 2018, Eff. Dec. 22, 2018.

Compiler's note: The constitutional amendment set out above was submitted to, and approved by, the electors as Proposal 18-2 at the November 6, 2018 general election. This amendment to the Constitution of Michigan of 1963 became effective December 22, 2018.

Constitutionality: The United States Supreme Court held in *Reynolds v Sims*, 377 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964) that provisions establishing weighted land area-population formulae violate the Equal Protection Clause of the United States Constitution. Because the apportionment provisions of former art IV, §§ 2 - 6 are interdependent and not severable, the provisions are invalidated in their entirety and the Commission on Legislative Apportionment cannot survive. In re Apportionment of State Legislature—1982, 413 Mich 96; 321 NW2d 565 (1982), rehearing denied 413 Mich 149; 321 NW2d 585; stay denied 413 Mich 222; 321 NW2d 615, appeal dismissed 459 US 900; 103 S Ct 201; 74 L Ed 2d 161.

Transfer of powers: See MCL 16.132.