Nos. 19-2377, 19-2420

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,

and

MICHIGAN REPUBLICAN PARTY, 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
Western District of Michigan, Southern Division
Honorable Janet T. Neff

BRIEF FOR DEFENDANT-APPELLEE
SECRETARY OF STATE JOCELYN BENSON

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

On motions by the *Daunt* and *MRP* Plaintiffs in these appeals, this Court has ordered that oral argument take place on March 17, 2020. Consistent with that order, Defendant-Appellee Michigan Secretary of State Jocelyn Benson respectfully requests the opportunity to participate in oral argument.

JURISDICTIONAL STATEMENT

Defendant-Appellee Michigan Secretary of State Jocelyn Benson concurs in the *Daunt* and *MRP* Plaintiffs' statements of jurisdiction.

STATEMENT OF ISSUE PRESENTED

1. A preliminary injunction constitutes extraordinary relief that will be granted only upon a showing that the requisite factors are met. Where none of the factors are met, particularly substantial likelihood of success on the merits, the District Court properly denied the motions to enjoin Secretary Benson from implementing the new provisions of Michigan's Constitution mandating the establishment of an Independent Citizens Redistricting Commission.

INTRODUCTION

Who gets to decide how the people will be governed—the people themselves, or candidates and party officials? The issue of partisan gerrymandering is one of the most contentious in our modern political landscape. The U.S. Supreme Court, in holding that partisan gerrymandering is non-justiciable, pointed to the establishment of independent redistricting commissions as a means to address this problem. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). That opinion—without expressing approval or disapproval—specifically cited to Michigan's 2018 adoption of article 4, §6 of the Michigan Constitution as one way for states to restrict partisan considerations in redistricting. *Id.* ("We express no view on any of these pending proposals. We simply note that the avenue for reform established by the Framers, and used by Congress in the past, remains open.")

The people of the State of Michigan have, with overwhelming approval, chosen to avail themselves of their avenue for reform. They no longer wish to have their electoral districts decided by elected officials, party officials, or any others with a stake in the outcome. Rather, they have established an independent commission comprised of

voters chosen randomly from three separate pools of applicants in such a way as to, as closely as possible, mirror the geographic and demographic makeup of the state. Mich. Const. 1963, art. 4, §6(2)(d)(ii). It is the expressed will of the people, through their adoption of this proposal, that voters will choose their elected officials rather than have their elected officials choose their voters.

This lawsuit presents a variety of challenges to the essence of this amendment. The Plaintiffs seek to override the will of the people, and demand that this Court declare, as a matter of constitutional law, that the people's attempt to create an independent, politically balanced redistricting process be enjoined and nullified. They argue, in essence, that those with a stake in the outcome *must* be included in the process of drawing those districts, and that any effort to proceed without them is constitutionally impossible. For the reasons that follow, Secretary of State Benson maintains that the First and Fourteenth Amendments place no such bounds on the ability of a free people to govern themselves, that Plaintiffs' arguments are legally unsound and unpersuasive, and that Plaintiffs' demand for an injunction was properly rejected.

STATEMENT OF THE CASE

A. Redistricting in Michigan before Proposal 2

Before addressing the new amendments, it is helpful to understand Michigan's redistricting history. In 1963, the people of Michigan enacted through the new Constitution a process for apportionment, now generally referred to as redistricting. *See* Mich. Const. 1963, art. 4, §§2-6 (as enacted). The Constitution created the Commission on Legislative Apportionment and charged that commission with establishing House and Senate districts in conformity with certain standards prescribed by the Constitution. *Id.* If the commission failed to approve a plan, the proposed plans were to be submitted to the Michigan Supreme Court for its review and approval of the plan that best met the constitutional criteria. *Id.*

The commission consisted of "eight electors, four of whom shall be selected by the state organizations of each of the two political parties whose candidates for governor received the highest vote at the last general election at which a governor was elected preceding each apportionment." *Id.* Each political party, however, was required to choose members from four prescribed geographic areas. *Id.* And the

Constitution rendered ineligible from serving on the commission "officers or employees of the federal, state or local governments," and thereafter precluded commission members from "election to the legislature until two years after the apportionment plan in which they participated" became effective. *Id.*

The Secretary of State served as the non-voting "secretary" of the commission and provided it with "all necessary technical services." The commission made its own rules and was to "receive compensation provided by law." And the Legislature was required to "appropriate funds to enable the commission to carry out its activities." *Id.*

Shortly after the enactment of these constitutional provisions, the U.S. Supreme Court in *Reynolds v. Sims* declared apportionment criteria similar to Michigan's unconstitutional. 377 U.S. 533 (1964). The Michigan Supreme Court ordered the commission to establish a plan consistent with *Reynolds*, which the commission failed to do, and the Michigan Supreme Court thereafter ordered the commission to adopt the one plan that was based on appropriate standards. *In re Apportionment of State Legislature-1964*, 128 N.W.2d 722 (1964).

In 1972, the commission again failed to agree on a plan, and the Michigan Supreme Court again ordered the commission to approve the plan that best met the constitutional criteria. *In re Apportionment of State Legislature–1972*, 197 N.W.2d 249 (1972). Likewise, in 1982 the commission again failed to agree upon a plan, and the competing plans were submitted to the Michigan Supreme Court. *In re Apportionment of State Legislature–1982*, 321 N.W.2d 565, 571 (1982). This time, however, the Michigan Supreme Court ordered the commission to address whether it continued to have authority to act given the constitutional invalidity of certain apportionment criteria. *Id.* The Court ultimately held that the valid rules were "inextricably interdependent and therefore [ ] not severable" from the invalid rules, and that "the function of the commission, which depends on those rules, and indeed the commission itself, [were] not severable from the invalidated rules." *Id.* at 572. The Court thus ordered the former director of elections for Michigan to draw a plan consistent with standards articulated by the Court, which the Court would review and approve after a public hearing. *Id.* at 583.

Due to the invalidity of the constitutional apportionment provisions, the next three redistricting plans – 1991[1], 2001, and 2011 – were drawn by the Legislature. In 2017, a lawsuit was filed in federal court challenging the 2011 plan, *see* Mich. Comp. Laws §§3.51a, 4.2001a, and 4.2002a, as an unconstitutional partisan gerrymander, s*ee League of Women Voters*, 373 F. Supp. 3d 867 (E.D. Mich. 2019).

B. Redistricting in Michigan after Proposal 2

Also in 2017, Intervening Defendant Count MI Vote d/b/a/Voters Not Politicians (VNP), a ballot proposal committee, filed an initiative petition to amend the Michigan Constitution signed by more than 425,000 voters. *See Citizens Protecting Michigan's Constitution v. Secretary of State, et al.*, 922 N.W.2d 404, 409-410 (Mich. Ct. App. 2018). The proposal principally sought to amend the apportionment provisions in article 4, §6 discussed above. The Michigan Court of Appeals rejected a challenge to the placement of the proposal on the November 2018 general election ballot, *id.* at 433-434, and the Michigan Supreme Court affirmed that rejection in *Citizens Protecting Michigan's*

[1] The Michigan Supreme Court ended up approving a plan for the 1991 cycle as well. *See In re Apportionment of State Legislature–1992*, 483 N.W.2d 52 (1992) and *In re Apportionment of State Legislature–1992*, 486 N.W.2d 639 (1992).

Constitution v. Secretary of State, et al., 921 N.W.2d 247, 270-278 (Mich. 2019).

Identified as Proposal 18-2 on the November 6, 2018, general election ballot, the proposal passed overwhelmingly.[2] The amendments became effective December 22, 2018. *See* Mich. Const. 1963, art. 12, §2.

1. Functions of the Independent Citizens Redistricting Commission

The amendments re-establish a commission–now the Independent Citizens Redistricting Commission–charged with redrawing Michigan's congressional and state legislative districts according to specific criteria. Mich. Const. 1963, art. 4, §6(1), (13). The amendments prescribe eligibility requirements and a complex selection process for membership on the Commission. *Id.*, §6(1)-(2). The Commission is granted authority to provide for its own rules and processes, and the Legislature must appropriate money to compensate the commissioners and to enable the Commission to perform its functions. *Id.*, §6(4)-(5). The Secretary of State acts as a non-voting secretary to the Commission, and "in that capacity shall furnish, under the direction of

[2] 2018 Michigan Election Results, available at https://mielections.us/election/results/2018GEN_CENR.html.

the commission, all technical services that the commission deems necessary." *Id.*, §6(4). The Commission must hold public hearings both before and after drafting plans and must ultimately approve a plan for each district. *Id.*, §6(8)-(9), (14). The Michigan Supreme Court may review a challenge to any plan adopted by the Commission. *Id.*, §6(19).

2. Selection of the Independent Citizens Redistricting Commission

As amended, article 4, §6 requires the Commission to consist of 13 commissioners (rather than the previous 8 members). *Id.*, §6(1). The 13 commissioners must include 4 commissioners who affiliate with the Republican Party, four commissioners who affiliate with the Democratic Party, and, unlike the prior commission, 5 commissioners who do not affiliate with either major party. *Id.*, §6(2)(f).[3] In order to meet this requirement, and to funnel applicants into the right pools, persons applying to the Commission must complete an application and "attest under oath . . . either that they affiliate with one of the two political parties with the largest representation in the legislature . . . and if so,

[3] Section 6 does not specifically refer to the Republican Party or the Democratic Party but refers to the "major parties" with the "largest representation in the legislature." Mich. Const. 1963, art. 4, §6(2)(a)(iii).

identify the party with which they affiliate, or that they do not affiliate with either of the major parties." *Id.*, §6(2)(a)(ii)-(iii).

Completed applications then undergo a random selection process using a weighted statistical method to ensure that applicants drawn for each pool geographically and demographically mirror the makeup of the State. *Id.*, §6(2)(d). The randomly selected applications for each pool must then be submitted to the majority and minority leaders of the Michigan House and the Michigan Senate, who "may each strike five applicants from any pool or pools, up to a maximum of 20 total strikes by the four legislative leaders." *Id.*, §6(2)(d)(iii), (e). After that, the Secretary of State "shall randomly draw the names of four commissioners for each of the two pools of remaining applications affiliating with a major party, and five commissioners from the pool of remaining non-affiliating applicants." *Id.*, §6(2)(f).

Once selected, each commissioner holds office until the Commission has completed the redistricting process for the applicable census cycle. *Id.*, §6(18). Each commissioner must "perform his or her duties in a manner that is impartial and reinforces public confidence in the integrity of the redistricting process." *Id.*, §6(10). The Commission

must conduct its business at open meetings and encourage public participation, *id.*, §6(10), but commissioners "shall not discuss redistricting matters with members of the public outside of an open meeting of the commission," unless certain exceptions apply, *id.*, §6(11). Also, commissioners "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 . . . performs his or her duties." *Id.*, §6(11).

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." *Id.*, §6(14)(c). This means that at least 7 members must vote to approve a plan—2 Republicans, 2 Democrats, 2 unaffiliated commissioners, and one more commissioner of any category. If no plan is approved, a plan will be randomly selected under a ranked point system. *Id.*, §6(14)(c).

To be eligible for selection to the Commission, an applicant must be a registered voter eligible to vote in Michigan, *id.*, §6(1)(a), and not

be otherwise disqualified from holding an elective or appointive office under another provision of the Michigan Constitution, *id.*, §6(1)(d), or under article 4, §6, as amended. Thus, persons associating with any political party (major or minor), or persons who associate with no party at all, are eligible to apply to the Commission.

Section 6, however, renders ineligible an individual from serving as a commissioner if, within the last 6 years, the person was or is:

> (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 [11], 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[.] [*Id.*, §6(1)(a), (b)(i)-(vii).][4]

Section 6 further renders ineligible "a parent, stepparent, child, stepchild, or spouse of any individual disqualified under" the quoted provisions. *Id.*, §6(1)(c).

Those applying for the Commission must "attest under oath that they meet the qualifications" described above. *Id.*, §6(2)(a)(iii). The Secretary of State must "[e]liminate . . . applications of applicants who do not meet the qualifications in parts (1)(a) through (1)(d) of [§6] based solely on the information contained in the applications." *Id.*, §6(2)(d)(i). (This provision does not apply to the attestation of party or no-party affiliation, which is required under §6(2)(a)(iii)).

Secretary Benson created an application form and drafted eligibility guidelines to assist voters in applying for appointment to the Commission.[5] Creating the application form is the Secretary of State's obligation under §6(2)(a), and providing guidance regarding the terminology used in §6(1)(a)-(d) is consistent with this obligation.

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[4] Certain of these exclusions echo former §6, which prohibited "officers and employees of the federal, state, or local governments" from serving on the former apportionment commission. Mich. Const. 1963, art. 4, §6 (as enacted).

[5] https://www.michigan.gov/sos/0,4670,7-127-1633_91141---,00.html.

(*Daunt* Mtn for P.I., R.4-1, Ex. A, PageID #93-99; R.4-2, Ex. B, PageID #100-109.) The Secretary of State began accepting mailed and online applications for appointment to the Commission in January 2020. The deadline for applying is June 1, 2020.

C. Procedural history.

The *Daunt* Plaintiffs filed their complaint and motion for preliminary injunction on July 30, 2019. (*Daunt* Compl., R. 1; *Daunt* Mtn for P.I., R. 4.) On August 12, 2019, VNP moved to intervene as a Defendant. (*Daunt* VNP Mtn, R. 11.) The District Court granted the motion on August 23, 2019. (*Daunt* Order, R. 23.) The *MRP* Plaintiffs filed their complaint and motion for preliminary injunction on August 22, 2019. (*MRP* Compl., R. 1; *MRP* Mtn for P.I., R. 2.) VNP moved to intervene in *MRP* as well, (*MRP* VNP Mtn, R. 12), and the Court granted the motion on September 6, 2019, (*MRP* Order, R. 15.) Secretary Benson moved to consolidate the cases, (*Daunt* Benson Mtn, R. 27), and the Court granted the motion on September 11, 2019, (*Daunt* Order, R. 30.) In the same order, the Court issued a consolidated briefing schedule regarding the motions for preliminary injunction, with Defendants briefs due September 19, 2019, and

Plaintiffs' replies due October 3, 2019. *Id.* Secretary Benson timely filed her responses to the motions for preliminary injunction, (*Daunt* Benson P.I. Brf, R. 39; *MRP* Benson P.I. Brf, R. 37), and filed motions to dismiss in both cases as well, (*Daunt* Benson MTD, R. 42; *MRP* Benson MTD, R. 40). The District Court denied the motions for preliminary injunction on November 25, 2019. (Opn., R. 67). The motions to dismiss remain pending. The *Daunt* Plaintiffs filed their notice of appeal on November 26, 2019, (*Daunt* NOA, R. 69), and the MRP Plaintiffs filed their notice on December 5, 2019, (*MRP* NOA, R.65).

STANDARD OF REVIEW

The courts weigh four factors when deciding whether to grant a preliminary injunction: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Hall v. Edgewood Partners Ins. Ctr.*, 878 F.3d 524, 526-27 (6th Cir. 2017) (citation omitted).

This Court typically reviews a district court's weighing of these factors for abuse of discretion and its legal conclusions, including its assessment of the plaintiffs' likelihood of success on the merits, de novo. *Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012). But in cases involving First Amendment claims, "the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits. This is so because . . . the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the [challenged action]." *Id.* (citation and internal quotation marks omitted).

SUMMARY OF ARGUMENT

The District Court did not abuse its discretion or otherwise err in denying Plaintiffs' motions for injunctive relief. The Court properly applied the *Anderson-Burdick* balancing test to Plaintiffs' First and Fourteenth Amendment claims, which primarily challenge the eligibility and composition provisions for establishing Michigan's new redistricting Commission. Because these provisions are election-related regulations, the balancing test applies. And even if the balancing test does not apply, the "deferential approach" discussed by this Court in

Citizens for Legislative Choice v. Miller, 933 F. Supp. 1041 (1998) would. And under either test, the challenged provisions are constitutional given the State's compelling interest in structuring its government, which interest includes deciding how redistricting will occur in Michigan.

The eligibility provisions are designed to eliminate undue political influence in the drawing of district lines, and they do so by rendering ineligible to serve on the Commission individuals whose participation would otherwise raise a conflict of interest. Plaintiffs are excluded not because of their political affiliation or activity, but because their private financial or political interest conflicts with the public duty of the Commission to act impartially. Any burden on Plaintiffs' constitutional rights is minimal and temporary, and plainly outweighed by the State's compelling interest. None of the Plaintiffs' speech rights are being unconstitutionally restrained, and the State has a valid and constitutional ability to control the official speech of Commission members. Last, to the extent that any eligibility requirements are held to be unconstitutional, those provisions may be severed and the

remaining provisions would remain operable such as to allow the Commission to convene and perform its assigned duties.

ARGUMENT

I. The district court did not err in denying the motions for preliminary injunctive relief where the factors weigh against enjoining Secretary Benson from implementing the new provisions of Michigan's Constitution mandating the establishment of an Independent Citizens Redistricting Commission.

A. Plaintiffs have not shown a strong likelihood of success on the merits of their First and Fourteenth Amendment claims.

The *Daunt* and *MRP* Plaintiffs argue that the eligibility provisions violate both their First Amendment speech and association rights and their rights under the Equal Protection Clause. Neither of these claims are likely to succeed.

1. The *Anderson-Burdick* balancing test applies to all Plaintiffs' claims.

Secretary Benson argued below that the *Anderson-Burdick* balancing test provided the proper standard for reviewing Plaintiffs' First and Fourteenth Amendment claims. (*Daunt* Benson P.I. Brf., R.39, PageID #27-28.) The district court agreed. (Op., R.67, PageID #26-27.) On appeal, Plaintiffs argue this was error because this case

does not involve the administration of elections. (*Daunt* Brf., Doc. 39, PageID #28-35; *MRP* Brf., R.26, PageID #25-26.) The *Daunt* Plaintiffs argue that this Court "has already held that *Anderson-Burdick* applies only to laws impacting the administration of candidate elections." (*Daunt* Brf., Doc. 39, PageID #30 (citing *Moncier v. Haslam*, 570 F. Appx. 553 (6th Cir. 2014)). But their reliance on *Moncier* is misplaced since that case addressed only standing, and it referred to the *Anderson* and *Burdick* cases for the point that neither case substantively supported the plaintiff's First and Fourteenth Amendment claims in *Moncier*. 570 F. Appx. at 559-560. Moreover, this Court recently applied the balancing test to election statutes regulating the initiative and referendum process. *See Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019). As the Court noted there, "we generally evaluate First Amendment challenges to *state election regulations* under the three-step *Anderson-Burdick* framework." *Id.* (emphasis added).

The *Daunt* Plaintiffs further suggest that *Anderson-Burdick* does not apply because the eligibility criteria directly regulate speech. (*Daunt* Brf., Doc. 39, PageID #32) (citing *McIntyre v. Ohio Elections Comm,* 514 U.S. 334 (1995)). But they do not (although, like many

election-related regulations, certain of the criteria indirectly impact Plaintiffs' associational rights). And contrary to Plaintiffs' arguments, the provisions at issue *do* relate to the "'mechanics of the electoral process.'" (*Daunt* Brf., Doc. 39, PageID #32) (quoting *McIntyre,* 514 U.S. at 345-46.) Although Commissioners are appointed state officers and not elected officials,[6] the eligibility criteria resemble candidate-qualification laws, which are reviewed under *Anderson-Burdick*. *See Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 920 (6th Cir. 1998) ("courts evaluate candidate eligibility requirements by balancing the state's interests against the individual voter's interests").

This Court applied *Anderson-Burdick* in *Citizens for Legislative Choice v. Miller*, which addressed qualifications for office, specifically Michigan's constitutional term-limits provision for state legislators. There, as here, the plaintiffs alleged that the term-limits provision violated their First and Fourteenth Amendment associational rights. *Id*. at 919. Employing the *Anderson-Burdick* balancing test, the Court first concluded that the provision did not impose a severe burden

[6] Contrary to Plaintiffs' suggestion, commissioners will not be state employees. *See* Mich. Const. 1963, art. 11, §5.

because voters do not have a right to "vote for a specific candidate or even a particular class of candidates," e.g., legislators with experience, *id*. at 921, the provision did not impose "a content-based burden," and voters "have many other avenues to express their preferences," including their preference for experience, *id*. at 922.

Second, the Court determined that the "State of Michigan has a compelling interest in enacting" term limits. *Id*. at 923. The Court observed that "Michigan has a fundamental interest in structuring its government," and that "[e]very court to address the issue has found that a State has a compelling interest in imposing lifetime term limits." *Id.* (citations omitted). Recognizing the State's asserted interests of "'maintaining the integrity of the democratic system,'" "foster[ing] electoral competition," "enhance[ing] the lawmaking process," "curbing special interest groups," and "decreasing political careerism," the Court "express[ed] no views on the wisdom of term limits," but rather "respect[ed] Michigan's views." *Id*.

And third, the Court determined that "Michigan narrowly tailored [its provision] to satisfy its compelling interests." *Id*. at 924. "Michigan asserts that only lifetime term limits will ensure a complete turnover of

all legislative seats every few years, and that only lifetime term limits can erase all of the problems associated with incumbency. We defer to Michigan's judgment." *Id.* The Court concluded that "even if [it] found that lifetime term limits burdened voters severely, [it] would still uphold [the provision] under the compelling interest standard," and thus it "passe[d] the *Anderson-Burdick* balancing test regardless of whether" rational basis or strict scrutiny review applied. *Id.*

A more recent decision further supports application of *Anderson-Burdick* here. In *Libertarian Party of Ohio v. Wilhem*, No. 2:19-cv-02501, 2020 WL 134142, at *5 (S.D. Ohio Jan. 13, 2020), the court addressed a challenge to the appointment process for the Ohio Elections Commission, which required that the Commission be comprised of three members each of the major political parties, and one unaffiliated member. *Id.* at *3. The Libertarian Party argued that the exclusion of minor-party representation on the Commission violated their First and Fourteenth Amendment rights. *Id.* at *2. The court applied the *Anderson-Burdick* balancing test to conclude that the statute was "not discriminatory towards minority political parties" and "did not constrain fundamental constitutional rights." *Id.* at *5. Rather, it

"imposed reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters," that advanced the state's important regulatory "interest in ensuring [ ] political balance on its Elections Commission [to] protect[ ] the fairness of the deliberative party process and that judicial and policy-making decisions are well rounded and diversified." *Id.*

Under *Citizens for Legislative Choice* and *Libertarian Party of Ohio,* the *Anderson-Burdick* balancing test may be applied to assess qualifications for state offices in the context of elections. Here, the amendment is fundamentally an election regulation since the Commission will play a role in Michigan's electoral process by drawing the districts within which state and federal candidates will seek election to office. Thus, the qualifications to become members of the Commission are properly subject to the balancing test.

This test–from *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)–requires a court to "first consider the character and magnitude of the asserted injury to the rights protected by the [Constitution] that the plaintiff seeks to vindicate." *Green Party of Tenn. v. Hargett (Hargett II)*, 791 F.3d 684,

693 (6th Cir. 2015)(internal quotation marks and citations omitted). "Second, it must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* Last, "it must determine the legitimacy and strength of each of those interests and consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*

In conducting this review, the Court should be mindful that "[b]ecause redistricting is quintessentially a political process that the Constitution assigns to the States and Congress, federal courts' supervision is largely limited." *Shapiro v. McManus*, 203 F. Supp. 3d 579, 590-91 (D. Md. 2016) (citations omitted).

2. Plaintiffs are unlikely to succeed on their First Amendment claims challenging the eligibility requirements.

a. The State has a compelling interest in deciding who will be responsible for redistricting in Michigan, and how it will be accomplished.

The State's interest here is compelling. "As a sovereign polity, Michigan has a fundamental interest in structuring its government." *Citizens for Legislative Choice*, 144 F.3d at 923 (citing *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991)). "[I]t is a characteristic of our

federal system that States retain autonomy to establish their own governmental processes." *Arizona State Legislature v. Arizona Independent Redistricting Comm.*, 135 S. Ct. 2652, 2673 (2015) (citing *Alden v. Maine*, 527 U.S. 706, 752 (1999) ("A State is entitled to order the processes of its own governance.")) "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory*, 501 U.S. at 460.

In passing upon the prior commission, the Michigan Supreme Court observed that redistricting "goes to the heart of the political process" in a constitutional democracy:

> A constitutional democracy cannot exist [ ] without a legislature that represents the people, freely and popularly elected in accordance with a process upon which they have agreed.
>
> The issue here is power – political power – in a constitutional democracy. The Legislature has the ultimate authority to make the laws by which the people are governed. *Any change in the means by which the members of the Legislature are chosen is a fundamental matter.*

In re Apportionment of State Legislature-1982, 321 N.W.2d at 581 (emphasis added). Although the Court ruled the commission no longer viable, it observed that the "power to redistrict and reapportion the

Legislature remains with the people," which power could be exercised "by amending the constitution[.]" *Id*. at 139-140.

This is precisely what the people did—taking the Legislature's de facto power to redistrict and placing it again within the power of a citizen Commission lodged in the legislative branch of government. *See, e.g*, *Arizona State Legislature*, 135 S. Ct. at 2673. In doing so, the people also provided for "the character of those who [will] exercise [the] government authority" of redistricting by prescribing eligibility requirements for the Commission. *Gregory*, 501 U.S. at 460.

This was necessary because political influence is endemic in the redistricting process. As noted in *League of Women Voters*, "[d]rawing district lines is an inherently political process." *Id*. at 881 (citing *Gaffney v. Cummings*, 412 U.S. 735 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences.")).

The ineligibility provisions in article 4, §6(1)(b) were designed "to squeeze every ounce of incumbent and legislative influence out of redistricting" by excluding persons who presently, or have within the last six years, participated in the political operation of Michigan

government. *See, e.g.,* Bruce E. Cain, Redistricting Commission: A Better Political Buffer?, 121 Yale L. J. 1808, 1824 (2012) (discussing California's similar provisions after which Michigan's are modeled). Each of the individual Plaintiffs who are excluded here has or can reasonably be perceived as having a private interest in the outcome of any redistricting plan approved by the Commission. The provisions are thus aimed at preventing the selection of a commissioner with a conflict of interest or who can be perceived as having a conflict of interest. *Id.* at 1808 ("Independent citizen commissions are the culmination of a reform effort focused heavily on limiting the conflict of interest implicit in legislative control over redistricting"), 1817-1821 (discussing legislative conflict of interest and intent of independent citizen commissions to increase separation from conflict of interest).

The concern over conflict and bias is why Commission members are required to perform their duties "in a manner that is impartial and reinforces public confidence" in the redistricting process. Mich. Const., Art. 4, §6(10). And as state officers all commissioners must act in the best interests of the public since an officer cannot be in a position where private interests conflict with public duties or tempt the officer to act

contrary to public interest. 63C Am. Jur. 2d, Public Officers and Employees, §246. *See also People v Township Board of Overyssel*, 11 Mich. 222, 225 (Mich. 1863); 1863 WL 2386 ("All public officers . . . are trusted with public functions for the good of the public; to protect, advance and promote its interests, and not their own.").

The ineligibility provisions are intended to avoid this scenario by excluding individuals whose private interests, based on their participation in the political machinery of the State, or their relationship to those who have participated, will conflict with their public duty to draw district lines in an impartial manner, free from undue political influence. The intent can be viewed as analogous to ensuring selection of an impartial jury, which is aimed at ensuring impartiality. *See* Cain, 121 Yale L. J. at 1825. *See also* Mich. Ct. R. 2.511(D) (for cause jury challenges).

Here, each of the individual Plaintiffs has a conflict or may reasonably be perceived as having a conflict of interest based on the office or position he or she *currently* holds. *See, e.g.*, *Storer v. Brown*, 415 U.S. 724, 737 (1974) ("if a candidate is absolutely and validly barred from the ballot by one provision of the laws, he cannot challenge

other provisions as applied to other candidates"); *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484-85 (1989) ("[I]t is not the usual judicial practice . . . nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied.").

Declared candidate for partisan office

Daunt Plaintiff Aaron Beauchine was a Republican candidate for a local county commission office in March 2018. (*Daunt* Compl., R.1, ¶ 9, PageID #5; *Daunt* Mtn for P.I., R.4-3, Beauchine Dec., ¶ 5, PageID #117.) Certainly, current candidates for a partisan local, state, or federal office are properly excluded from the Commission since they would have an interest in drawing district lines that would or could affect their own candidacies, or in drawing lines favorable or unfavorable to other candidates or legislators in an effort to advance their own interests. Even failed partisan candidates like Beauchine pose similar conflict concerns because he could have, or could be perceived as having, an interest in drawing lines that could benefit a future candidacy, his own or even another candidate's in the party.

Elected official to partisan office

Daunt Plaintiff Tom Barrett was elected as a Republican to the Michigan Senate in November 2018, and his term of office began January 1, 2019. (*Daunt* Compl., R.1, ¶8, PageID #5; *Daunt* Mtn for P.I., R.4-3, Barrett Dec., ¶ 5, PageID #114.) And *MRP* Plaintiff Hank Vaupel is presently a Republican state representative and was first elected in 2014. (*MRP* Compl., R.1, ¶25, PageID #6-7; *MRP* Mtn for P.I., R.3-5, Vaupel Dec., ¶5 PageID #86.) It could hardly be disputed that Senator Barrett and Representative Vaupel will have a personal interest in how their districts are redrawn in 2021, and in how the districts of their Republican colleagues, or their Democratic colleagues for that matter, will be redrawn.[7]

Several *Daunt* Plaintiffs serve as elected Republican precinct delegates: Plaintiff Linda Tarver, (*Daunt* Compl., ¶14, PageID #6), Plaintiff Mary Shinkle, *id*., ¶17, PageID #7, Plaintiff Norm Shinkle, *id*.,

[7] Their exclusion from the Commission is not only consistent with, but may be required by, article 4, §9, which prohibits sitting legislators from receiving "any civil appointment within this state," other than a notary public, while serving in office. Mich. Const. 1963, art. 4, §9. *See also* Mich. Const. 1963, art. 4, §8 ("No person holding any office . . . or position under . . . this state . . . may be a member of either house of the legislature").

¶18, PageID #7, and Plaintiff Clint Tarver, *id*., ¶21, PageID #8; *Daunt* Mtn for P.I., R.4-3, C. Tarver Dec., ¶5, PageID #153. *MRP* Plaintiff Terri Lynn Land is also an elected precinct delegate. (*MRP* Compl., R.1, ¶22, PageID #6; *MRP* Mtn for P.I., R.3-2, Land Dec., ¶6, PageID #80.) As does *MRP* Plaintiff Dorian Thompson. *Id*., ¶24, PageID #6; R.3-4, Thompson Dec., ¶5. Precinct delegates are elected at party primaries on a party basis at the precinct level. Mich. Comp. Laws, §§168.623a, 168.624. Precinct delegates vote at party conventions and assist their party by functioning as a conduit between local party members and the state parties by helping to recruit new members, elect party candidates, and ensure turnout at elections, among other duties.[8] As local party activists, precinct delegates certainly have an interest in how lines are drawn for the elected officials and candidates they support or will support in the future.

Officer of a national, state, or local political party

Daunt Plaintiff Anthony Daunt has served as an officer and member of the Clinton County Republican Party since 2017. (*Daunt*

[8] *See* Bridge Magazine, April 2018, https://www.bridgemi.com/michigan-government/fight-soul-michigan-gop-waged-precinct-precinct, (discussing significance of precinct delegates).

Compl., R.1, ¶7, PageID #5; *Daunt* Mtn for P.I., R.4-3, Daunt Dec., ¶5, PageID #111.) Since April 2017, Plaintiff Daunt has also served as a member of the governing body of the Michigan Republican Party Committee. *Id.* *Daunt* Plaintiff Kathy Berden has served as the national committeewoman of the Republican Party since 2016. *Id.*, ¶10, PageID #5; R.4-3, Berden Dec., ¶5, PageID #120. *Daunt* Plaintiff Gerry Hildenbrand has been a member of a governing body of a national, state, or local political party since 2017. *Id.*, ¶12, PageID #6; R.4-3, Hildenbrand Dec., ¶5, PageID #126. *Daunt* Plaintiff Linda Tarver serves as President of the Republican Women's Federation of Michigan, which is a voting member of the Michigan Republican Party's State Central Committee. *Id.*, ¶14, PageID #6; R.4-3, L. Tarver Dec., ¶5, PageID #132. *Daunt* Plaintiff Marian Sheridan has been the Grassroots Vice Chair of the Michigan Republican Party since February 2019. *Id.*, ¶16, 19 PageID #6, 7-8; R.4-3, M. Sheridan Dec., ¶5, PageID #138. *Daunt* Plaintiff Mary Shinkle has served as the Vice Chair of the Ingham County Republican Party since November 2018. *Id.*, ¶17, PageID #7; R.4-3, M. Shinkle Dec., ¶5, PageID #141. And Plaintiff Norm Shinkle has been an officer or member of a governing body of a

state political party since February 2017. *Id.*, ¶18, PageID #7; R.4-3, N. Shinkle Dec., ¶5, PageID #144.

MRP Plaintiff Laura Cox is the current chair of the MRP. (*MRP* Compl., R.1, ¶21, PageID #5; *MRP* Mtn for P.I., R.3-1, Cox Dec, ¶5, PageID #78). *MRP* Plaintiff Land is the current chair of the 3rd Congressional District for MRP, and in that capacity serves as a member of the MRP State Committee. *Id.*, R1, ¶22, PageID #6; R.3-2, Land Dec., ¶5, PageID #80. *MRP* Plaintiff Vaupel is currently a member of the Livingston County Republican Party Executive Committee and has held that position since 2015. *Id.*, R.1, ¶25, PageID #6-7; R.3-5, Vaupel Dec., ¶6, PageID #86.

As party leaders, these Plaintiffs are presumably responsible for growing the party at a local, state, or national level, and advancing the interests of the party, including supporting Republican candidates for office. Like elected precinct delegates, if not more so given their leadership status, these elected or appointed party officers have an interest in how lines are drawn for the elected officials and candidates they support or will support in the future.

Consultant or employee of elected officials, candidates, campaigns, or political action committees

Daunt Plaintiff Gary Koutsoubos has been a consultant to a candidate(s) for a federal, state, or local office or a political action committee since July 8, 2017. (*Daunt* Compl., R.1, ¶13, PageID #6; *Daunt* Mtn for P.I., R.4-3, Koutsoubos Dec., ¶5, PageID #129.) *Daunt* Plaintiff Patrick Meyers has been a paid consultant to candidate(s) for federal, state, or local office or a political action committee since 2010. *Id*., ¶15, PageID #6; R.4-3, Meyers Dec., ¶5, PageID #135.[9]

Employees and consultants for partisan elected officials have a personal interest in lines being drawn that benefit their partisan employers. Even former employees and consultants may have a residual interest in the employer's district with respect to maintaining connections or forging future connections in the district. And regardless, former employees and consultants raise conflict of interest concerns simply because of their status as former employees and consultants of partisan officials.

[9] These Plaintiffs declined to identify which officials, candidates, or political action committees they were paid to consult with.

Work for nonpartisan elected officials and candidates raises conflict issues as well. Again, the purpose of the ineligibility provisions is to separate the Commission and its members from *political* influence, not simply *partisan* influence. Nonpartisan officials and candidates can be as entrenched in the political machinery of government as much as any partisan, and thus have personal interests in who is elected in a particular district and therefore how it is drawn. As a result, working or consulting for these individuals raises the same concerns as it does with respect to the partisan officials discussed above.

Employee of the Legislature

Plaintiff Stephen Daunt is an employee of the Michigan Legislature and has been since January 1, 1991. (*Daunt* Compl., R.1, ¶11, PageID #6; *Daunt* Mtn for P.I., R.4-3, S. Daunt, ¶5, PageID #123.) Upon information and belief, Plaintiff Daunt presently works for the Michigan House Republican policy office. Certainly, as a current legislative employee who works in a partisan capacity, he has an interest in how his party's legislative districts are redrawn.

Registered lobbyist agent

Plaintiff Anthony Daunt is a registered lobbyist agent in the State of Michigan. (*Daunt* Compl., R.1, ¶7, Pg ID #5; *Daunt* Mtn for P.I., R.4-3, Daunt Dec., ¶5, PageID #111.) Plaintiff Daunt is a lobbyist for the Michigan Freedom Fund.[10] According to its website, the Michigan Freedom Fund is a nonprofit organization that creates educational initiatives, promotes issue advocacy, and supports policies that protect citizens' constitutional rights.[11] As the Fund's lobbyist, Plaintiff Daunt seeks to influence the legislative or administrative actions of public officials, including legislators, in order to promote the interests of the Fund. *See* Mich. Comp. Laws, §§4.412(1), 4.415(1)-(3). Lobbyists like Plaintiff Daunt are active participants in the political process and their personal and financial success depends on forging relationships and currying favor with state and federal legislators on behalf of their special-interest clients. This means Plaintiff Daunt has an interest in

[10] Plaintiff Daunt's lobby registration information is available on the Secretary of State's website at https://miboecfr.nictusa.com/cgi-bin/cfr/lobby_detail.cgi?caller%3DSRCHRES%26last_match%3D50%26lobby_type%3D%2A%26lobby_name%3DDAUNT%26include%3Dactive%261%3D1%26lobby_id%3D12493%26last_match%3D0.

[11] See Michigan Freedom Fund, Our Mission tab, available at https://www.michiganfreedomfund.com/our-mission.

who is elected to the Legislature and Congress, which of course, is impacted by how district lines are drawn. This private interest conflicts with the public duty of a Commissioner to draw fair and impartial lines.

State employee exempt from classification

Daunt Plaintiff Koutsoubos was also an unclassified state employee between March 2014 and June 2017. (*Daunt* Compl., R.1, ¶13, PageID #6; *Daunt* Mtn for P.I., R.4-3, Koutsoubos Dec., ¶5, PageID #129.) Under Michigan's Constitution, the head of a principal department may employ up to five individuals in "policy-making" positions that are exempt from civil service. Mich. Const. 1963, Art. 11, §5. Plaintiff Koutsoubos was appointed by former Republican Secretary of State Ruth Johnson as an executive office representative and later appointed to the unclassified position of Director of the Office of External Affairs.[12] Plaintiff Koutsoubos's participation in state government as a high-level policymaker for a partisan elected state official raises the same conflict of interest concerns discussed above.

[12] The press release is available at https://www.michigan.gov/sos/0,4670,7-127--298666--s,00.html.

Family member of disqualified individual

Daunt Plaintiff Paul Sheridan is the son of Plaintiff Marian Sheridan. (*Daunt* Compl., R.1, ¶19, PageID #7-8; *Daunt* Mtn for P.I., R.4-3, P. Sheridan Dec., ¶5, PageID #147.) *Daunt* Plaintiff Bridget Beard is the daughter of Plaintiff Marian Sheridan. *Id.*, R.1, ¶20, PageID #8; R.4-3, Beard Dec., ¶5, PageID #150. As noted above, Marian Sheridan is the Grassroots Vice Chair of the Michigan Republican Party. (*Daunt* Mtn for P.I., R.4-3, M. Sheridan Dec., ¶5, PageID #138.)[13] As discussed above, Ms. Sheridan's status as a party leader presents a conflict because her private interests in the success of the party conflicts with the public duty of a commissioner to draw lines without consideration of who or which party will benefit from the lines drawn. Her Plaintiff children are conflicted because of their status as immediate family members. It is not unreasonable to think that Paul and Bridget, if chosen as Commissioners, would be inclined to perform their public duties in a way beneficial to the interests of their mother.

[13] According to the Michigan Republican Party website, Ms. Sheridan organizes grassroots events in order to spread the Republican message, grow the party, and recruit precinct delegates. See Michigan Republicans, Party Leadership tab, available at https://www.migop.org/about.

Even if that were not true, their presence on the Commission would raise the appearance of a conflict of interest.

MRP Plaintiff Savina Alexandra Zoe Mucci is the daughter of Tonya Schuitmaker, who was a Republican State Senator from 2011 until 2018, and then ran as a Republican candidate for Michigan Attorney General in 2018. (*MRP* Compl., R.1, ¶23, PageID #6; *MRP* Mtn for P.I., R.3-3, Mucci Dec, ¶5, PageID #82.) Ms. Schuitmaker's years as a legislator, during which she voted upon the current redistricting plans,[14] and her recent candidacy for a partisan statewide office presently preclude her from applying to the Commission. Her recent and significant participation in the political machinery of the State raise the private conflict issues the amendment seeks to protect against. And Ms. Schuitmaker's conflict is imputable to Plaintiff Mucci, her daughter. Like Paul Sheridan and Bridget Beard, it is not unreasonable to think that Ms. Mucci, if chosen as a Commissioner, would be inclined to perform her public duties in a way beneficial to the interests of her mother or the party in which her mother was such an

[14] See legislative history for 2011 P.A. 128, 2011 P.A. 129, available at http://www.legislature.mi.gov/(S(sn50dpwqfsfzc4uc0fqnr3l2))/mileg.aspx?page=PublicActs.

active participant. At a minimum, Mucci's presence on the Commission would raise the appearance of a conflict given her relationship to Ms. Schuitmaker, and Ms. Schuitmaker's recent political history.

As demonstrated above, each individual Plaintiff in this case is exactly who the people of Michigan intended to exclude given their activities and relationships and their concomitant conflicts of interest.

b. The burden on Plaintiffs' associational rights is minimal and only temporary.

Any burden on each Plaintiffs' speech and association rights resulting from the ineligibility provisions is minimal at best. Plaintiffs do not have a right to be a member of the Commission any more than they do any other commission or board created by the Michigan Constitution. *See, e.g.*, *Snowden v. Hughes,* 321 U.S. 1, 6-7 (1944) (no fundamental right to public employment); *Bullock v. Carter,* 405 U.S. 134, 142-43 (1972) (no "fundamental right to run for elective office"); *Moncier*, 570 F. Appx at 559 (finding no federally protected interest in being candidate for state-court judge). Notably, the Michigan Constitution already limits political affiliation on certain of these entities by limiting the number of appointments of persons associated with a political party. *See* Mich. Const 1963, art. 2, §7 (Board of State

Canvassers); art. 5, §28 (State Transportation Commission); art. 5, §29 (Civil Rights Commission); art. 11, §5 (Civil Service Commission).

Article 4, §6 expressly requires that 8 of the 13 Commissioners be affiliated with a major political party—four members each of the Republican Party and the Democratic Party. Plaintiffs, as persons who affiliate with the Michigan Republican Party, are eligible based on their affiliation to apply for the four Republican seats. But they cannot do so for this redistricting cycle—*not* because of their political affiliation, but because they have, or can reasonably be perceived as having, a conflict of interest given their present status, *e.g.*, partisan elected official or candidate, political party officer, daughter, *etc.* But Plaintiffs could be eligible for the next redistricting cycle. Indeed, they have approximately four years (given the six-year look back) in which to act to ensure their eligibility to apply for the next Commission.

For some Plaintiffs, this may mean declining to run for an office, or resigning from an office or position so they are eligible to apply for the Commission. But these are the kinds of decisions people often make in deciding to run for an office or seek an appointment to an office. There is a burden in making such decisions, but it certainly is not

severe. *See, e.g., Clements v. Flashing*, 457 U.S. 957 (1982) (upholding provision rendering ineligible certain persons from election or appointment to state legislature); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 835 n. 48 (1995) (noting validity of resign-to-run statutes); *Grizzle v. Kemp*, 634 F.3d 1314 (11th Cir. 2011) (reiterating that "the existence of barriers to a candidate's access to the ballot" requires only rational-basis review, not strict scrutiny); *Worthy v. State of Michigan, et al.*, 142 F. Supp. 2d 806 (E.D. Mich. 2000) (holding that a Michigan provision barring sitting judges from seeking non-judicial election office for a period of time was constitutional).

c. On balance, the State's compelling interest outweighs the minimal burden on Plaintiffs' associational rights.

If a state imposes "severe restrictions" on a plaintiff's constitutional right, its regulations survive only if "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. But "minimally burdensome and nondiscriminatory" regulations are subject to a "less-searching examination closer to rational basis" and "'the State's important regulatory interests are generally sufficient to justify the restrictions.'" *Ohio Council 8 Am.*

Fed'n of State v. Husted, 814 F.3d 329, 335 (6th Cir. 2016) (citing *Green Party of Tenn. v. Hargett (Hargett I)*, 767 F.3d 533, 546 (6th Cir. 2014), and quoting *Burdick*, 504 U.S. at 434). Regulations falling somewhere in between—"i.e., regulations that impose a more-than-minimal but less-than-severe burden—require a 'flexible' analysis, 'weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it.'" *Ohio Democratic Party*, 834 F.3d at 627 (quoting *Hargett I*, 767 F.3d at 546).

As discussed above, the State has a compelling interest in prescribing qualifications for who may serve on the Commission—the quasi-legislative body now charged with performing the fundamental task of redistricting in Michigan. The composition and selection of Commission members was designed to remove, or significantly reduce, the political influence endemic in the drawing of lines. Commissioners are randomly selected through a complex process, and individuals, like Plaintiffs, with identifiable conflicts of interest are ineligible to apply to the Commission. The ineligibility provisions do not discriminate based on political speech or association, or on any other fundamental right. And the burden on Plaintiffs is minimal. Plaintiffs remain free to speak

and associate as Republicans in numerous other ways, they just cannot do so as members of the Commission for this redistricting cycle. Again, this is not because of their past or present political association but because their private interest conflict with the public duties of commissioners to draw fair and impartial lines, as free from political influence as possible. Moreover, Plaintiffs' burdens are temporary. Plaintiffs are free to plan and act accordingly to render themselves eligible to apply to the Commission for the 2030 redistricting cycle.

Here, Michigan has devised its solution to unconstitutional partisan gerrymandering in the redistricting process. *See Arizona State Legislature*, 135 S. Ct. at 2673 (the Court "has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems'") (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)). The State's compelling interest in having district lines drawn by commissioners independent of political influence plainly outweighs the minimal burden imposed on Plaintiffs by the ineligibility provisions. *See Rucho*, 139 S. Ct. at 2507 (noting with approval that states, including Michigan, are acting to restrict "partisan considerations in districting" by "placing [the] power to draw electoral districts in the

hands of independent commissions") (citations omitted). The provisions are tailored to the individuals who present the most concern for conflicts based on their participation in the political process. And these exclusions further the State's interest in entrusting redistricting to Commissioners unencumbered by political considerations. The provisions do not violate Plaintiffs' First Amendment rights.

Given the State's interests, even if Plaintiffs' were correct that the *Anderson-Burdick* balancing test does not apply here, the "deferential approach" discussed by this Court in *Citizens for Legislative Choice* would. There, the Court noted that the term limits provision implicated the State's "power to prescribe qualifications for its officeholders," and "[a]s such, they involve the State's authority to structure its government." 144 F.3d at 924 (citing *Gregory v. Ashcroft,* 501 U.S. 452, 463 [ ] (1991)). "As a sovereign [under the Tenth Amendment], Michigan deserves deference in structuring its government." *Id*. at 925 (citing *Ashcroft*, 501 U.S. at 460, 463). Under "this framework, a court should uphold a qualification 'unless the qualification is plainly prohibited by some other provision in the Constitution.'" *Id*. (quoting *Bates v. Jones,* 131 F.3d 843, 858-859 (9th Cir.1997) (en banc panel)

(Rymer, J.). The Court concluded it would affirm the constitutionality of the terms limits provision under either *Anderson-Burdick* "or the deferential framework," because "[u]nder either approach, our decision rests on the State's sovereign interest in structuring its government. It is an interest recognized by both the text of the Constitution and the spirit of federalism." *Id.*

Here, the ineligibility provisions are not plainly prohibited by another provision of the Constitution. Plaintiffs argue that the eligibility requirements are unconstitutional because they exclude Plaintiffs for exercising their First Amendment rights to political speech and association. But under *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980), and *Rutan v. Republican Party of Illinois,* 497 U.S. 62 (1990), the State may properly consider political beliefs and party affiliation in appointing an individual to a public position, *see*, *e.g.*, *Newman v. Voinovich*, 986 F.2d 159 (6th Cir. 1993) (holding that "gubernatorial appointments to public positions are governed by the principle of *Elrod, Branti* and *Rutan*"), if it is a "policymaking" or "confidential" position. *Peterson v. Dean*, 777 F.3d 334, 341 (6th Cir. 2015) (citing *Elrod*, 427 U.S. at 356-57, 366-68).

Positions that fall within this exception include those that "are part of a group of positions filled by balancing out political party representation," and "positions specifically named in relevant . . . state . . . law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted[.]" *Peterson*, 777 F.3d at 342 (citing *Sowards v. Loudon Cnty.,* 203 F.3d 426, 435 (6th Cir. 2000)).

Members of the Commission fall within both categories because major political party representation on the Commission must be balanced and commissioners will be carrying out policies of political concern. This means that Plaintiffs' party affiliation may be considered in determining whether they are eligible to appointment to the Commission without violating the First Amendment. *See Peterson*, 777 F.3d at 342. But three of the eligibility provisions also consider partisan activity. *See* Mich. Const., Art. 4, §6(b)(i)(candidate for partisan office), ii (elected partisan official), (iii) (officer or member of the governing body of a political party).

In *Albers-Anders v. Pocan*, the plaintiff, a former Republican member of the Wisconsin Assembly, applied for a committee clerk

position. 905 F. Supp. 2d 944 (W.D. Wis. 2012). The plaintiff sued, alleging she was not hired because she was a Republican in violation of her First Amendment rights. *Id.* The defendant Democratic Assembly member "contend[ed], he chose not to hire plaintiff because the position required political neutrality and he believed that her history of partisan political activity would diminish her effectiveness in the job." *Id.*

Citing *Branti* for the principle that party affiliation may be considered in connection with some government positions, the district court noted that the defendant was not claiming that the committee clerk position was such a position. *Id*. at 949. "Defendant's primary argument relies on a new twist on the *Branti* doctrine. He contends that it was appropriate for him not to choose plaintiff because of her well-known history of partisan political activity (rather than her Republican affiliation specifically), because the committee clerk is required to appear to be politically neutral." *Id*. at 950-51. The court noted the lack of cases specifically addressing this issue but determined "this is an appropriate exception to the general rule that public employers may not make employment decisions on the basis of protected First Amendment activities." *Id*. at 951. The court concluded as much

because existing case law confirmed that government employers can ban partisan activities during employment in a nonpartisan position, and by extension an employer could consider a job applicant's history of partisan activity in hiring for a position. *Id.* (citations omitted).

The court recognized that nonpartisanship was not a requirement of the committee clerk position. *Id.* "Nevertheless, given the nature of the clerk's responsibilities, a decision maker could reasonably consider an applicant's history of partisan activity. The committee clerk needs to be nonpartisan and maintain a reputation for being nonpartisan, because the clerk must work closely with committee members from both political parties and co-chairs from both parties." *Id.* Thus, the court concluded "that it would be appropriate for a decision maker to consider an applicant's history of partisan political activity when selecting among applicants for the committee clerk position." *Id.* at 952.

The same rationale applies here. Given the political significance of redistricting, the people determined that the Commission should be bipartisan and include equal members of Michigan's two major political parties. But the people also required Commissioners to "perform [their]

duties in a manner that is impartial[15] and reinforces public confidence in the integrity of the redistricting process." Mich. Const. 1963, art. 4, §6(10). To help ensure impartiality and maintain the appearance of impartiality, the people determined that individuals who have engaged in certain overtly partisan[16] activities—running for a partisan elected office, holding a partisan elected office, or acting on the governing body of a political party—should be excluded from the Commission.

As discussed above with respect to various Plaintiffs, it was not unreasonable for the people to suspect that persons who have engaged in this level of partisan politics may not be able to perform their duties on the Commission in an impartial manner, free from personal conflict. And even if these individuals could perform their Commission duties impartially—which notably none of the Plaintiffs have declared they could or would—at the very least, their presence on the Commission

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[15] The term "impartial" has been defined to mean "not partial or biased**:** treating or affecting all equally[.]" *See* Merriam-Webster Online Dictionary, at https://www.merriam-webster.com/dictionary/impartial.

[16] The term "partisan" has been defined to mean "a firm adherent to a party, faction, cause, or person," or a "feeling, showing, or deriving from strong and sometimes blind adherence to a particular party, faction, cause, or person[.]" *See* Merriam-Webster Online Dictionary, at https://www.merriam-webster.com/dictionary/partisan.

would raise concerns about their impartiality and would undermine rather than "reinforce[ ] public confidence in the integrity of the redistricting process." Mich. Const. 1963, art. 4, §6(10).

Plaintiffs note that a person affiliated with the Republican party but who has not engaged in the partisan activities described above, could be just as biased, or even more so, than individuals who have engaged in such activities. (*Daunt* Brf., Doc. 39, PageID #48). This may be true for certain individuals.[17] But the people balanced the right to political speech and association with the requirements for party-affiliated but impartial Commission members and excluded only three narrow categories of partisan activity. These exclusions are not unconstitutional.[18]

In a similar vein, the *Daunt* Plaintiffs argue it is unconstitutional to exclude lobbyists, citing *Autor v. Pritzker*, 740 F.3d 176 (D.C. Cir. 2014) in support of their argument. (*Daunt* Brf., Doc. 39, PageID #38). But *Autor* does not help them, because *Autor* determined the exclusion

[17] Even if true, if such a person was randomly selected, he or she could ultimately be struck under article 4, §6(2)(d)(iii), (e).
[18] To the extent the eligibility requirements in subsections §6(1)(b)(iv), (v), and (vii), regarding various consultants and employees involve partisan considerations, they would be subject to the same analysis.

in that case should have been reviewed under *Pickering v. Board of Education*, 391 U.S. 563, 574-75 (1968). The *Autor* Court noted that service on an advisory board differs from public employment, but believed "the government's interest in selecting its advisors [ ] . . . may justify similar restrictions on individual rights." *Id.* at 183-84 (citations omitted). The court thus remanded for a review of the plaintiffs' First Amendment claims under *Pickering*. *Id.* at 184. But that review never occurred because the case was ultimately dismissed. *See Autor v. Blank*, 161 F. Supp. 3d 111 (D.C. 2016).

Here, applying that important *Pickering* analysis (which Plaintiffs do not address), the State's interests outweigh any lobbyist's right to petition. Under the *Pickering* balancing test, a court weighs "the employee's interest in 'commenting upon matters of public concern'" against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Leary v. Daeschner*, 228 F.3d 729, 737 (6th Cir. 2000) (quoting *Pickering*, 391 U.S. at 568).

As discussed above with respect to Plaintiff Anthony Daunt, lobbyists have an interest in who is elected to the Legislature and

Congress, which of course, is impacted by how district lines are drawn. The presence of a lobbyist on the Commission would undermine the mission of the Commission, which is to perform its duty to draw district lines in an impartial manner and to conduct itself in a manner that reinforces public confidence in the redistricting process. A lobbyist's activities would also impede his or her performance as Commissioner because other Commission members may question the lobbyist's impartiality given his or her interest in and relationship with legislators. In short, to the extent the *Autor* decision provides guidance for addressing the exclusion of registered lobbyists, the State can show a legitimate justification for the exclusion under *Pickering*.

Both the partisan activity and lobbyist exclusions are consistent with the U.S. Supreme Court's decision in *U.S. Civil Service Comm'n v. National Ass'n of Letter Carriers,* 413 U.S. 548 (1973) and its progeny. In *Letter Carriers*, the Supreme Court emphatically reaffirmed the federal government's right to limit federal employees' ability to engage in partisan political activity in order to promote the efficient and effective operation of the government. *Id*. at 556. *See also Broadrick v. Oklahoma*, 41 U.S. 601 (1973) (holding state statute regulating political

activity by state employees constitutional). The Court recognized, among other interests, the government's interest in ensuring that laws are executed "without bias or favoritism" and avoiding the appearance of such bias. *Id*. at 575-76. The people of Michigan intended the same thing when they voted to exclude certain categories of individuals from appointment to the Commission.

Finally, with the respect to the family member exclusion, Plaintiffs argue "[t]here 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[.]" (*Daunt* Brf., Doc. 39, PageID #47.) This provision is akin to an anti-nepotism policy. In *Montgomery v. Carr*, teachers challenged a school anti-nepotism policy on the basis that it substantially interfered with their First Amendment right to associate through marriage. 101 F.3d 1117, 1119 (6th Cir. 1996). This Court determined that if the policy constituted a "direct and substantial" burden on the right to marriage, then strict scrutiny applied, but if it did not, then rational basis review applied. *Id*. at 1124. The Court determined that the policy did not impose a substantial burden, and thus it applied rational basis

review in upholding the policy's constitutionality. *Id*. at 1125-26. This analysis is similar to that applied by the Eleventh Circuit to a statute precluding relatives of certain employees of a school system from serving as members of that district's elected board of education. *See Grizzle v. Kemp*, 634 F.3d 1314 (11th Cir. 2011). There, the court concluded that the statute did not severely burden the plaintiffs' First Amendment rights because they can "run for any other elected office; they may vote, distribute campaign literature, voice their political opinions, and participate in and hold office in their political party of choice." 634 F.3d at 1324. And as a result, the statute was subject to a less demanding review than strict scrutiny. *Id*. at 1324-25.

Plaintiffs argue here that the family member exclusion, which is limited to the parent-child or spousal relationship, severely burdens their right to associate as Republicans. But it does not. There are innumerable other ways that Plaintiffs can associate as Republicans or express their political views. Excluding them from one particular public office based on the status of their family member does not directly or substantially, or severely, burden their associational rights. Moreover, as discussed above with respect to Plaintiffs Sheridan, Beard, and

Mucci, the exclusion advances the State's compelling government interest in composing an impartial Commission. *Montgomery*, 101 F.3d at 1130. As this Court has observed, "[t]he means chosen need not be the best for achieving these stated ends, but need only be rational in view of those ends." *Id.* (citing *Interstate Towing Ass'n, Inc. v. City of Cincinnati,* 6 F.3d 1154, 1166 (6th Cir.1993)). The familial exclusion is a rational means to achieving an impartial Commission and is thus constitutional.

In sum, the eligibility provisions do not violate Plaintiffs' First Amendment rights under any standard of review. The State has a compelling interest in deciding who will perform the fundamental task of redistricting in Michigan. And the eligibility provisions advance this compelling interest by excluding persons with real or perceived financial or political conflicts of interest from serving on the Commission. Any burden on the individual Plaintiffs' rights to associate as Republicans is minimal, and plainly outweighed by the State's interests. The provisions are constitutional.

3. Plaintiffs are unlikely to succeed on their equal protection claim challenging the eligibility provisions.

The *Daunt* Plaintiffs argue that the eligibility provisions violate their equal protection rights. (*Daunt* Brf., Doc. 39, PageID #50-52.)

"To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis." *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (internal quotation marks omitted). Plaintiffs must show that the government has "treat[ed] differently persons *who are in all relevant respects alike*." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added); *see also Jolivette v. Husted*, 694 F.3d 760, 771 (6th Cir. 2012) ("[The plaintiff's] equal-protection claims do not get off the ground because independent candidates and partisan candidates are not similarly situated for purposes of election regulations.").

Plaintiffs generally complain that they are being treated differently from those who choose not to exercise their rights of association. (*Daunt* Brf., Doc. 39, PageID #51.) They also complain

that registered lobbyists are treated differently than unregistered lobbyists, and that paid consultants and employees are treated differently than volunteers. *Id.* But Plaintiffs do not explain how they are similarly situated in all relevant respects to those individuals. Indeed, they are not. Thus, their equal protection claims do not even get off the ground. *See Jolivette*, 694 F.3d at 771.

Regardless, the eligibility provisions are constitutional. The *Anderson-Burdick* balancing test applies to equal protection claims as well. *Obama v. Hust*, 697 F.3d. at 423 (2012). Thus, similar to the rational basis test, where a regulation imposes only a minimal burden, the State's important regulatory interests are generally sufficient to justify the restriction. *Ohio Council 8 Am. Fed'n of State*, 814 F.3d at 335.

As discussed above, Plaintiffs' First Amendment rights are not severely burdened. And any burden is sufficiently outweighed by the State's interest. The manifest purpose of the amendment is to transfer the power of establishing legislative districts from the Legislature and the political parties who dominate it to the hands of citizens without a personal stake in the details of how and where those districts are

drawn. Its passage was a reflection of popular frustration at the manipulation of those districts by the legislators who would then campaign to fill them. Partisan elected officials, candidates, lobbyists, consultants, and party officials constitute the political apparatus that created the circumstances that gave rise to the amendment in the first place. Allowing them to now become members of the Commission would contradict the purpose of the amendment. The government has an important interest in protecting the legitimacy of the people's chosen redistricting system. This interest sufficiently supports Plaintiffs' exclusion from the Commission.

Similarly, as discussed above, there is a legitimate reason to exclude certain close family relations of otherwise excluded persons. Art. 4, §6(1)(c). These relations can be presumed to have a financial or other interest in the outcome of the redistricting plans on behalf of their parents, children, or spouses. Again, this is akin to other kinds of anti-nepotism statutes and restrictions. *See, e.g*, Mich. Comp. Laws §432.31 (lottery ticket "shall not be purchased by and a prize shall not be paid to . . . any spouse, child, brother, sister or parent residing as a member of the same household in the principal place of abode of an officer or

employee"); Mich. Ct. R. 2.511(D)(8) (jurors related within "the ninth degree of consanguinity or affinity to one of the parties or attorneys" are removable for cause).

Such anti-nepotism restrictions have been repeatedly upheld against equal protection challenges. This Court has observed that, "virtually every court to confront a challenge to an anti-nepotism policy on First Amendment, substantive due process, equal protection, or other grounds has applied rational basis scrutiny." *Montgomery,* 101 F.3d at 1126. And the Michigan Supreme Court has noted that the validity of anti-nepotism and no-spouse policies "ha[ve] been consistently sustained when challenged under Title VII of the Civil Rights Act of 1964." *Miller v. C.A. Muer Corp,* 362 N.W.2d 650, 653 (Mich. 1984) (citations omitted). It would be very curious if anti-nepotism restrictions that are virtually identical to those that have previously been upheld under Title VII were held to violate equal protection concerns in this case.

Plaintiffs claim that because the amendment burdens their fundamental rights, strict scrutiny should apply. (*Daunt* Brf., Doc. 39, PageID #50-52). But again, under *Anderson-Burdick* review there is no

severe burden on any fundamental right under the First Amendment, and the minimal burden imposed by the ineligibility provisions is outweighed by the State's legitimate—indeed compelling—interest in determining who will perform redistricting. Thus, even if strict scrutiny were to apply in lieu of *Anderson-Burdick* or the "deferential approach" the amendment would still survive review.

According to Plaintiffs, the amendment must be "narrowly tailored to legitimate government objectives." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972). Here, the objectives of the amendment are to create a decision-making body that is independent of the partisan political structure of the State's political parties and special interests. So, the question becomes whether the eligibility provisions are narrowly drawn to achieve that aim. Again, Plaintiffs' exclusion is not based upon their chosen party affiliation; it is instead premised upon their real or apparent conflicts of interest in the outcome of the decisions the Commission will be required to make.

And the amendment is narrowly drawn because it limits its categorical exclusions to only those with a real or potential conflict of interest based upon their being a partisan office holder, candidate,

party official, lobbyist, or paid political consultant or employee, or those who are children, step-children, parents, step-parents, or spouses to someone who falls in one of those categories. It does not apply to an overly broad group of relatives, only those who are very close or even in the same household. Nor does it bar them from all governmental office-holding, only temporarily from this one Commission that exists for a short period of time every ten years. The amendment excludes only as many people as necessary to prevent those with a conflict of interest from being on the Commission, and so it is narrowly drawn to further its compelling objectives. The eligibility provisions do not violate equal protection.

4. Any unconstitutional eligibility provisions may be severed from the rest of the amendment.

"Severability is of course a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). The *Daunt* Plaintiffs argue that if any of the ineligibility provisions are found unconstitutional, the entire amendment must be struck because the provisions are not severable. But their argument against severability rests on an analysis of *statutory* interpretation and the supposed inability to divine what the voters intended regarding severability. (*Daunt* Brf., Doc. 39, PageID

#52-59.) This argument misses the amendment's *express* inclusion of a severability clause, which provides that if a court finds "*any part"* of the amendment unconstitutional the "provision held invalid is severable from the remaining portions of this section." Mich. Const. 1963, art. 4, §6(20). The severability clause's plain language manifests the voters' intent to retain the amendment even if some portion were found unconstitutional. *Citizens Protecting Michigan's Constitution v. Secretary of State,* 921 N.W.2d 247, 253 (Mich. 2018) (holding that courts interpret Michigan's Constitution according to "the text's original meaning to the ratifiers, the people, at the time of ratification," and that the primary rule is that of "common understanding"). Here, the language of the amendment as to severability is plain, its meaning is clear, and no further inquiry into the voter's intent is necessary or required.

But, without observing any difference between a statute and a constitutional amendment, the *Daunt* Plaintiffs proceed to consider how severability might apply if the amendment was, instead, a statute. (*Daunt* Brf., Doc. 39, PageID #53-54.) Notably, Michigan's statutory severability is rooted in its own statute, which is what calls for

consideration of whether it would be consistent with the intent of the legislature, and its language is different than what is written in this amendment. Mich. Comp. Laws §8.5. By relying on §8.5 as its structure for a severability analysis, Plaintiffs' argument misapplies state precedent and is inconsistent with prior holdings of the Michigan Supreme Court. *See In re Apportionment of State Legislature*, 321 N.W.2d 565 (Mich. 1982) ("This Court will not apply case law developed in the resolution of controversies concerning statutory invalidity where the issue presented concerns constitutional invalidity."

Moreover, even if the statutory severability provisions could be applied, it would hardly compel the conclusion that the amendment is ineligible for severance. In *Midland Cogeneration Venture L.P. v. Naftaly*, 803 N.W.2d 674, 682 (Mich. 2011), the Michigan Supreme Court held that, in order to determine whether severance is appropriate, the court must consider whether the statute remaining after severing the offending provision, "is capable of functioning[.]" Each of the eligibility provisions at issue here are sufficiently discrete requirements such that each could, if necessary, be struck from the amendment, leaving the remaining provisions of §6 operable and in

effect. The cases the *Daunt* Plaintiffs rely upon are clearly distinguishable, in that each of them found that the enactments were incapable of operating without the severed language. *In re Apportionment of State Legislature*, 321 N.W.2d at 588-581; *Lucas v. Forty-Fourth General Assembly,* 377 U.S 713, 735 (1964) (finding amendment unworkable without the stricken provision and holding there was "no indication" that the provisions were severable); *Randall v. Sorrell*, 548 U.S. 230 (2006) (holding state statute could not effectively function without the offending provisions). In contrast to those cases, the eligibility provisions here are not so interconnected to each other or to the remainder of §6 that the Commission could not be appointed and perform its redistricting function without them.

Additionally, in arguing that severability is not possible, the *Daunt* Plaintiffs appear to suggest that the eligibility provisions are "so essential" as to cast doubt on the operation of the amendment as a whole. (*Daunt* Brf., Doc. 39, PageID #56-59.) This undermines their constitutional arguments that the exclusions are not narrowly drawn. The *Daunt* Plaintiffs' argument that the eligibility provisions cannot be severed is without merit.

5. Plaintiffs are unlikely to succeed on their First and Fourteenth Amendment claims regarding the composition of the Commission and the speech provision.

The *MRP* Plaintiffs allege that the composition of the Commission infringes upon MRP's rights of association and engages in viewpoint discrimination and censorship. (*MRP* Brf., Doc. 26, PageID #26-35, 44-64.) These claims are also unlikely to succeed.

a. The State has a compelling interest in deciding who will be responsible for redistricting in Michigan, and how it will be accomplished.

For reasons already discussed above, the *Anderson-Burdick* balancing test (or the "deferential approach" discussed in *Citizens for Legislative Choice*) applies to MRP's claims. And like the eligibility provisions, the composition and speech provisions advance the State's compelling interest in its redistricting process.

b. The burden on MRP's associational rights is minimal and outweighed by the State's compelling interest.

MRP asserts that the process of allowing voters to self-identify their political affiliation and randomly drawing from pools based on their designations somehow infringes on MRP's ability to define its identity. (*MRP* Brf., Doc. 26, PageID #26-35.) Of course, Secretary

Benson does not dispute that people have the right to "associate with others for the common advancement of political beliefs and ideas." *See Kusper v. Pontikes*, 414 U.S. 51 (1973). But the composition provisions do not interfere with that right.

MRP argues that article 4, §6 infringes on its ability to "limit the association" to those people of its choosing, and relies extensively upon *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000), for support. (*MRP* Brf., Doc. 26, PageID #28.) In that case, the U.S. Supreme Court found unconstitutional a statute providing for "blanket primaries," where all voters—including those not affiliated with any party—could vote for any candidate for nomination to an office regardless of the candidate's affiliation. MRP essentially argues that it wishes to exercise the same power to choose its "standard bearer." (*MRP* Brf., Doc. 26, PageID #29.)

But in *Jones*, the Court emphasized the significance of the role nomination played in its decision: "In no area is the political association's right to exclude more important than *in the process of selecting its nominee*." 530 U.S. at 575 (emphasis added). The Court also disapproved of blanket primaries based on their potential for having a party's *nominee* chosen by adherents of an opposing party. *Id.*

at 578. The Court further was concerned by the risks posed by "[r]egulating the identity of the party leaders" because that could "color the parties' message and interfere with the parties' decisions as to the best means to promote that message." *Id*. at 579. So, in relying on *Jones,* MRP's claim rests almost entirely upon the premise that Commission members are something that the Constitution says they cannot be—party officials. MRP's claim is therefore based upon a fundamental misunderstanding of what the Commission is, and who its members will be.

MRP continues to assert that the commissioners will be their "standard bearers" and representatives. (*MRP* Brf., Doc. 26, PageID #26-27.) This statement is the essence of the claim, and it is fundamentally incorrect. There is no such office as "Republican Commissioner," nor is there a "Democratic Commissioner" or even a "non-affiliating Commissioner." Under article 4, §6, there are instead only 13 *commissioners*. Mich. Const. 1963, art. 4, §6(1). Those 13 commissioners are randomly selected from a pool of 200 applicants,

divided into 60 affiliating with each major party[19] and 80 unaffiliated, and from which up to 20 applicants may be struck by legislative leaders. Mich. Const. 1963, art. 4, §6(2)(d)(ii), (e). The Secretary of State will *randomly*[20] draw 4 commissioners from the pools affiliating with each major party, and 5 commissioners from the pool of non-affiliating members. Mich. Const. 1963, art. 4 §6(2)(f). The critical facts are that these are not nominees for elected positions, they are not chosen to be representatives of the parties, and they are not party leaders. In fact, the Constitution does not require that the applicants be actual *members* of any party—they need only attest to whether they affiliate themselves with a party.

Significantly, commissioners are selected from a pool of applicant *voters* to serve on a commission that is independent of the government

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[19] The amendment defines "major party" as the two political parties with the largest representation in the legislature. Although MRP currently qualifies, there is no constitutional guarantee that it will always meet the criteria.

[20] In its brief to this Court, MRP asserts that the Secretary of State "selects" commissioners from the "Republican pool" to serve as public officials and compares that to a political appointment. (*MRP* Brf., Doc. 26, PageID #29). MRP's statement omitted that the selection was random and will be accomplished electronically, and that the pool was itself drawn from a pool that was comprised of randomly selected applicants.

and of the political parties. The drive to adopt this amendment was named "Voters Not Politicians," and that name succinctly summarizes both the purpose of the amendment and its method of revising the State's means of redistricting. That is to say, the point of the movement was to have the districts drawn by the voters instead of legislators or other political insiders. And with respect to political insiders, it should not be forgotten that Michigan's former apportionment commission—whose 8 members were chosen by the major parties—was a failure.

Under this new amendment, applicants self-identify their party affiliation and attest to that affiliation under oath. Mich. Const. 1963, art. 4, §6(2)(a)(iii). The 4 commissioners who will be chosen from the pool of applicants claiming affiliation with the Republican Party are not Republican "standard bearers"—they will simply be voters who identify themselves with the Republican Party. Likewise, 4 commissioners will be Democratic Party voters, and 5 will be voters who do not identify with either major party. The entire point of the amendment is that the commissioners are not speaking for party interests or policy objectives—they are speaking as voters and attempting to draw district maps that do not politically advantage any political party.

The fact that the commissioners will be voters rather than candidates or nominees is not a distinction without a difference. Commissioners are not party nominees or candidates, and so they are not chosen to be party standard bearers or to deliver the party's message. As the District Court correctly observed, neither the amendment nor membership in the Commission defines what it means to be a Republican or a Democrat. (Op., R.61, Page ID #858-859.) As a result, *Reed* and *Jones* are inapplicable. Because the position of commissioner is randomly drawn from pools of voters, there is no basis for them to be regarded as "standard bearers" for the parties—rather, commissioners will be drawn from the same people to whom the parties will later appeal to *vote for* those standard bearers and representatives.

MRP now asserts that the *lack of definition* for what constitutes "Democratic" or "Republican" affiliation somehow exacerbates the harm to it, although it is certain that—had the amendment included it—such a definition would have been the subject of a different legal challenge. (MRP Brf., Doc. 26, PageID #28.) Nonetheless, MRP's argument fails to adequately explain how it is harmed by allowing individual citizens to determine their own political preferences. Notably, MRP has not

offered any indication of what criteria it would suggest for determining who is or is not a "bona fide Republican."

Again, MRP has not argued that it has any existing process to prevent or exclude people from claiming affinity with the party. To the contrary, under Michigan law, there is no means for MRP to exclude voters even from participating in its primary elections. Under Mich. Comp. Laws §§168.575 and 168.576(2), any qualified and registered elector may vote for any party ticket, provided he or she votes for only one. So, in order to vote in the Michigan Republican primary, a voter need only commit to vote for only Republican candidates in the primary–in essence, voters assert their affiliation with the Republican party by self-declaring their intention to vote for them. The amendment's process of self-affiliation is no different.

And even if MRP *could* exclude people from claiming affinity with its party, it is far from clear how it could do so because Michigan law no longer provides an option for electors to declare a party preference, and voting history may reflect a reaction to particular candidates more than the voter's ideals and beliefs. In short, MRP is asking this Court to enjoin the operation of the amendment for failing to grant it a power it

does not otherwise possess and would have great difficulty exercising, even if it had it.

Or, more pointedly, MRP seeks a federal court order declaring that *only* the leadership of major parties may choose who decides district boundaries. MRP argues that the drawing of districts is so closely intertwined with partisan ideology that it is impossible to identify communities of interest and draw a map without becoming a "standard bearer" for the parties, and so only the party may choose who wields that power. Notably, MRP offers no case citation from any federal court holding that such considerations are the exclusive province of political parties. While the drawing of districts may involve "political" considerations, it is not a political ideology in and of itself. Drawing districts is simply the means of setting the field of contest, and while there is nothing necessarily improper in one party seeking advantages over another at the margins, that should not be mistaken for an actual *belief*.

MRP next attacks the provisions on the grounds of potential malfeasance and argues that someone may falsely claim affiliation to the detriment of MRP. But the risks of such conduct would be great

and the rewards would be small. A "false affiliant" would have to commit perjury on the application merely to have a chance of being randomly drawn for one of the partisan-affiliating pools of 60 applicants (of which 50% are populated by people who returned a randomly-mailed application), from whom only 4 would ultimately be chosen as commissioners. Mich. Const. 1963, art. 4, §6(2)(a)(iii), §§6(2)(d)(ii), §6(2)(f). A false affiliant would have to be willing to commit a felony just to have a chance of being randomly drawn, and that chance would grow smaller in proportion to the number of people who apply. The best defense against a false affiliant would be for the major parties to encourage "bona fide" affiliants to apply.

Also, MRP is not without remedies if they believe an individual is attempting to perpetrate a fraud. If MRP concludes that one of the applicants in the pool is falsely claiming an affiliation with it, it may take appropriate action to report the crime of perjury. *See* Mich. Comp. Laws §750.423(1)-(2). MRP could also ask its legislative leaders to strike an applicant they believe to be misrepresenting themselves as a Republican voter. If a commissioner is discovered to have perjured himself or herself in the application after being seated, he or she could

be removed after any conviction. Mich. Const. 1963, art. 4, §6(3)(c). And ultimately, the Commission itself could, on a vote of 10 of its members, remove another member for reason of gross misconduct. Mich. Const. 1963, art. 4, §6(e).

Lastly, in examining article 4, §6, it is foreseeable that the Court may question why it references parties at all. The answer is that if the commissioners were simply chosen from all voters at random, there would exist the possibility that—through random chance—the pool would be comprised of a greater number affiliating with one party than the other. Such an outcome would turn a system intended to create a rational and deliberative body into a mere lottery. In order to avoid that outcome, the amendment provides a process to deliberately choose a set number of persons affiliating with the major parties, but who are not otherwise bound to party leaders and their party objectives.

The amendment imposes no burden on the MRP's selection of its party leadership, or its candidates for partisan offices. The State is not deciding who is or who may be a member of the MRP. The Secretary of State is not even directly choosing the members of the Commission. The amendment merely provides for Commission members to be drawn from

pools of voters who attest under oath whether they affiliate with either of the major parties. The selection of voters identifying themselves as affiliating with a major party does not burden the association right of MRP or any of the individual Plaintiffs. And even if there is a minimal burden, it is plainly outweighed by the people's important interest in composing an impartial Commission.

c. The composition provisions do not discriminate on the basis of viewpoint.

The *MRP* Plaintiffs next claim that the composition provisions impose viewpoint discrimination in violation of the First Amendment. Quoting *McCutcheon v. F.E.C.,* 572 U.S. 185, 207 (2014), in which the U.S. Supreme Court held, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment," the *MRP* Plaintiffs contend that the amendment attempts to "enhance the voice" of a group through its allocation of Commission seats. (*MRP* Brf., Doc. 26, PageID #46.) In particular, MRP claims that the amendment favors applicants who do not affiliate with either major party. *Id.* In short, the *MRP* Plaintiffs argue that because the Commission will be composed of 4 voters affiliated with MRP, 4 affiliated with the

Democratic Party, and 5 unaffiliated with either party, the composition discriminates against them by giving 5 seats to non-affiliated voters because "four is not greater than five." *Id.* at PageID #47.

But the *MRP* Plaintiffs continue to err in reducing the non-affiliated Commission seats to being "independent" seats. The 5 Commission seats are not reserved only for those who are independent, and instead they are for all applicants who do not affiliate with either of the two major parties. Mich. Const. 1963, art. 4, §6(2)(b). This includes not just "independent" voters, but those who affiliate with any other party besides the two major parties. Notably, because the 5 members will be drawn from applicants based on their non-affiliation with the two major parties, the pool for those applicants would also include those who affiliate with parties that are not yet qualified to appear on the ballot in Michigan. In short, the 5 "non-affiliated" members will be those who affiliate with *any other political identification* other than the two major parties. In contrast, the two major parties—including MRP—have 4 members affiliated with each. MRP is not disadvantaged by having 4 members affiliated entirely with it alone, as opposed to 5 members affiliating with all other groups and no group at all.

MRP also has not addressed the fact that the numerosity of commissioners in each of the three groups has little effect on the relative power those groups have in the Commission's decisions. Under article 4, §6(14)(c), while a final decision of the Commission to adopt a redistricting plan requires a majority vote (at least 7 members), that majority must include at least two commissioners from each of the major parties and at least two who do not affiliate with either major party. (Recall that the former failed apportionment commission's 8 members were evenly divided between the two major parties). In the event that a plan fails to satisfy that requirement, it then goes to a ranked choice vote by the Commission, but a plan must still be ranked in the top half of plans by at least two Commissioners not affiliated with the party of the Commissioner who submitted the plan, or—if it was submitted by a non-affiliated member—by two commissioners of a major party. So, regardless of whether the non-affiliated group has 4 or 5 members, a plan still requires a consensus among commissioners affiliating with the major parties. There is no ability for the non-affiliating members to outvote either of the two major parties. If anything, the one "extra" member of the non-affiliated group offers the

party-affiliating members a greater opportunity to obtain the necessary 2 non-affiliated votes to have their plan adopted.

Last, the *MRP* Plaintiffs' argument continues to be ambiguous on what "viewpoint" they seek to claim as being affected by the amendment. Their brief again suggests that Republican views are being disadvantaged by having 4 members as opposed to 5, but in the same sentence they also claim that the views of unaffiliated commissioners are being enhanced. (*MRP* Brf., Doc. 26, PageID #46.) But if the imbalance of viewpoints is between "affiliated with a major party vs. no major party affiliation," then the mathematics of Plaintiffs' argument is incorrect. There are 5 members who have no affiliation with the two major parties, but there are 8 major party-affiliated members when the Republican and Democratic affiliated members are combined as representing the "major party affiliating" viewpoint. To borrow a phrase from MRP's brief, 5 is not greater than 8, and there is no advantage to the members who do not affiliate with a major party at the expense of major-party-affiliating members. (*MRP* Brf., Doc. 26, PageID #47.)

On the other hand, if the viewpoint at issue is simply that of "Republican" affiliation, then the *MRP* Plaintiffs' argument must still fail because they have the same number of members as the Democratic affiliation and more members than those reserved for those who maintain affiliation with any other party. And, as argued above, the "not affiliated with a major party" group of commissioners is not limited to so-called "independent" voters and may include those who affiliate with any minor parties or even parties who have not yet organized and qualified for the Michigan ballot. They could belong to no party, or any other non-major party. So, there is no unified viewpoint for the group "non-affiliated" commissioners and—on the face of the amendment—the composition of the Commission does not advantage any group or viewpoint. The claim of viewpoint discrimination, therefore, fails.

d. The burden on future commissioners' free speech rights is minimal and outweighed by the State's compelling interest.

Last, the *MRP* Plaintiffs claim that article 4, §6(11) is an unconstitutional restraint on the commissioners' First Amendment freedom of speech. This claim is seriously compromised by significant legal defects, and it has no likelihood of succeeding on the merits.

First, Plaintiffs in this case do not have standing to make this claim. The district court gave MRP the benefit of the doubt and assumed their standing arguendo, but it is far from clear how MRP is capable of raising this claim. (Op., R.67, PageID #967.) Even now, the *MRP* Plaintiffs make no effort to show how they have either suffered or will imminently suffer a cognizable injury-in-fact as a result of this restriction. The "law of standing" has been set forth by the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs must identify a "concrete and particularized" "injury in fact" and a "causal connection" between such injury and, here, the limitation on commissioners discussing redistricting with the public. *Id.* More than a "mere pleading requirement," this is an "indispensable" part of their case that Plaintiffs must support at every stage of litigation "with the manner and degree of evidence required" at each. *Id.* at 561.

None of the Plaintiffs here are Commission members and so the restriction will have no effect on their ability to engage in protected speech. Although they "wish to apply" for the position of commissioner, they are not currently eligible to be members of the Commission. (*MRP* Compl., R.1, ¶20-25, PageID #5-7.) As a result, even if they applied,

they would be disqualified from membership on the Commission before the Commission held its first meeting, and there would still be no restraint on their speech. Further, even if they were eligible to apply, there is no certainty that they would ultimately be selected as one of the 4 Republican party-affiliated commissioners and so the application of the restriction to them is purely hypothetical.

Second, even if the claim could properly be raised, it is based upon an erroneous legal premise. The *MRP* Plaintiffs argue that §6(11) imposes "restrictions on speech" and that public officers may not be compelled to relinquish First Amendment rights as citizens to speak on matters of public concern. (*MRP* Brf., Doc. 26, PageID #51.) This argument rests on *Pickering*, 391 U.S. at 568, for the principle that public officials may not constitutionally be compelled "to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the [institution] in which they work." But what the *MRP* Plaintiffs overlook is that the First Amendment rights of public officials are not absolute, and the State has the power to restrict the *official* speech of its officials and employees.

In *Garcetti v. Ceballos*, the U.S. Supreme Court confirmed the *Connick* test, in which public employee speech gives rise to a First Amendment claim only if the employee speaks as a citizen on a matter of public concern. 547 U.S. 410, 418 (2006) (citing *Connick v. Myers*, 461 U.S. 138 (1983)). The Court held that "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Id.* at 418 (citation omitted). If an employee is not speaking "as a citizen" on a matter of public concern they do not have a First Amendment cause of action. *Id.* And when public employees make statements pursuant to their official duties they are not speaking as citizens, and so restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. *Id.* at 421.

The *MRP* Plaintiffs argue that the restriction does not apply only to "official" speech, (*MRP* Brf., Doc. 26, PageID #50-51), but fails to explain how a commissioner would be speaking upon "redistricting matters" in any manner *other* than in their official capacity. The

restriction of article 4, §6(11) is not a blanket ban on the commissioners' ability to speak, and instead it requires only that they:

> [S]hall not discuss redistricting matters with members of the public outside of an open meeting of the Commission, except that a Commissioner may communicate about redistricting matters with members of the public to gain information relevant to the performance of his or her duties if such communication occurs (a) in writing or (b) at a previously publicly noticed forum or town hall open to the general public.

Mich. Const. 1963, art. 4, §6(11). Commissioners remain free to discuss the operation of the Commission as a body, and they can even discuss redistricting with the public so long as they are gathering information from the public and doing so in writing or in a public forum. The narrow restriction applies only to the topic of redistricting and only to those who are engaged in the Commission's redistricting work. In short, it applies only to speech made in their official capacity as commissioners. Indeed, the District Court concluded as much. (Op., R.67, PageID #967.) Because the restriction applies only to official speech, §6(11) does not infringe upon any First Amendment rights.

In the alternative, even if the Court concludes that the amendment infringes upon speech made in a Commissioner's capacity as a citizen, that would not end the inquiry. Under *Garcetti*, where

employees or public officers are speaking as citizens about matters of public concern, they may still be required to adhere to speech restrictions that are necessary for their employers to "operate efficiently and effectively." 547 U.S. at 419. The Supreme Court's decisions since *Pickering* have sought to balance the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions.

Here, there are serious problems posed by the prospect of commissioners or staff making public statements about its redistricting process outside of public meetings. With 13 members, there will be 13 individual views about the process, and individual statements about the redistricting without other members present may result in misleading or inaccurate information being presented to the public as the Commission's official position. Non-public discussions additionally expose the Commission to unseen influence and efforts to subjugate its independent operation. Just as jurors are told not to discuss the case with their family or friends, the restriction of §6(11) operates to allow the Commission to perform its task without outside influence. Again, it

bears repeating that the commissioners and staff may discuss redistricting with the public—indeed, the amendment encourages such dialog—but they must simply do so in writing or at a public forum. The interests in having the work of the Commission proceed in an orderly and public fashion outweigh the interests of anyone who would desire to extract gossip from commissioners, or to influence their votes out of public view. To the extent there is any burden on the commissioners' First Amendment rights, it is minimal and is substantially outweighed by the State's important interests in maintaining an impartial Commission, and the appearance of an impartial Commission.

B. Plaintiffs failed to demonstrate irreparable injury.

Plaintiffs have not demonstrated any irreparable injury. First, there is no associational or expression-based exclusion of their viewpoints, because by the express terms of the amendment, there will be persons affiliating with their political party on the Commission, and Plaintiffs otherwise remain free to affiliate and express their views. Their temporary ineligibility to apply to the Commission is not based on their party affiliation, but upon the conflict inherent between their private interests and the public duty of the Commission to draw lines in

a fair and impartial manner. For the same reasons stated in the discussion of the merits, Plaintiffs' First and Fourteenth Amendment rights are not violated by the amendment, and therefore Plaintiffs suffer no irreparable harm on the basis of any alleged constitutional deprivation.

Second, to whatever extent Plaintiffs raise a claim based on "exclusion from state employment," that is not an "irreparable" injury. The Supreme Court has held injuries that can be later compensated with "other corrective relief" are not irreparable. *Sampson v. Murray*, 415 U.S. 61, 90 (1974). Here, there would be an adequate remedy for any supposed loss of opportunity, because Plaintiffs could—if they prevailed—receive monetary compensation for the pay they might have received as Commission members.

Also, to the extent Plaintiffs allege that they may be unconstitutionally excluded from service on the Commission, applications are not due until June 1, 2020, thus there is time enough to fully litigate the issues before these dates. Plaintiffs have no imminent risk of harm and a preliminary injunction is premature and unnecessary. Plaintiffs have not demonstrated an irreparable injury.

But even if one or more of the Plaintiffs could demonstrate irreparable harm because they are ineligible to be members of the Commission, as set forth above Plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claims. "[A] finding that there is simply no likelihood of success on the merits is usually fatal" to a request for injunctive relief. *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000).

C. An injunction will cause irreparable harm to the State and is not in the public interest.

An injunction will irreparably harm the State and its citizens. The constitutional amendment challenged here was duly enacted by the Michigan voters as an expression of their will as to who they wanted to exercise the power of drawing their electoral districts. As discussed in the Affidavit of Sally Marsh, any delay in the process will interfere with the ability to prepare for and implement the amendment's requirements. (*Daunt* Benson P.I. Brf., R.39-1, Ex. A, PageID #673-681.) As of January 1, 2020, applications have been mailed to randomly selected voters. *Id.* at ¶3a, PageID #674. The injunction requested by the Plaintiffs would have prevented the applications from being published or mailed, making it impossible for

anyone to apply and jeopardizing the ability to form a functioning Commission. The constitutionally mandated schedule is as follows: The deadline to return completed applications is June 1, 2020, and by July 1, 2020, the Secretary of State must select and submit 200 applications to legislative leaders. *Id*. at ¶3b-c, PageID #674. The legislative leaders' "strikes" must be provided to the Secretary by August 1, and the random draw for the 13 commissioners must be held by September 1, 2020. *Id*. at ¶3d-e, PageID #675. And the Commission must be seated by October 15, 2020. *Id*. at ¶3f, PageID #675.

While the eligible applicants could be expanded if the exclusions are found to be too broad, or the entire process could even be halted if the entire amendment is somehow ultimately overturned—a preliminary injunction would effectively render the amendment inoperable until the next redistricting cycle. The status quo would be to allow the system to function as written in the Michigan Constitution.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Defendant-Appellee Michigan Secretary of State Jocelyn Benson respectfully requests that this Court

affirm the opinion and order of the District Court denying Plaintiffs' motions for preliminary injunctive relief.

Respectfully submitted,

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Dated: February 3, 2020

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type Style Requirements

1. This brief does not comply with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains more than 13,000 words. This brief contains 17,305 words. A motion for excess word count is filed contemporaneously with this brief.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Century Schoolbook.

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CERTIFICATE OF SERVICE

I certify that on February 3, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendant-Appellee Benson, per Sixth Circuit Rule 28(a), 28(a)(1)-(2), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No. Range
Plaintiffs' Complaint	07/30/2019	Daunt R. 1	1-32
Plaintiffs' Motion for Preliminary Injunction	07/30/2019	Daunt R. 4-1, 2, 3	93-154
VNP Motion to Intervene	08/12/2019	Daunt R. 11	167-169
Opinion & Order	08/28/2019	Daunt R. 23	262-265
Benson's Motion to Consolidate	09/11/2019	Daunt R. 27	314-319
Order Granting Consolidation	09/11/2019	Daunt R. 30	333-335
Benson's Response in Opposition to Motion for Preliminary Injunction	09/19/2019	Daunt R. 39	523-586
Benson's Reply Re: Motion to Dismiss	10/10/2019	Daunt R. 61	888-905
Opinion	11/25/2019	Daunt R. 67	926-971
Plaintiffs' Notice of Interlocutory Appeal	11/26/2019	Daunt R. 69	974-976

Plaintiffs' Complaint	08/22/2019	MRP R. 1	1-34
Plaintiffs' Motion for Preliminary Injunction	08/22/2019	MRP R. 2	35-37
Brief in Support Plaintiffs' Motion for Preliminary Injunction	08/22/2019	MRP R. 3-1, 2, 3, 4, 5	77-94
VNP Motion to Intervene	09/05/2019	MRP R. 12	112-114
Order Granting Motion to Intervene	09/05/2019	MRP R. 15	171
VNP Brief Support Motion for Dismissal & Judgment	09/19/2019	MRP R. 26	284-324
Benson's Response in Opposition to Motion for Preliminary Injunction	09/19/2019	MRP R. 37	506-575
Benson's Motion to Dismiss	09/19/2019	MRP R. 40	580-587
Opinion	11/25/2019	MRP R. 61	823-868
Plaintiffs' Notice of Interlocutory Appeal	12/05/2019	MRP R. 65	877-878