No. 19-2377

IN THE
United States Court of Appeals
FOR THE SIXTH CIRCUIT

ANTHONY DAUNT, *et al.*,
Plaintiffs-Appellants,

v.

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

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

The State spills much ink regurgitating the District Court's erroneous analysis and introducing new arguments not raised below. Voters Not Politicians ("VNP") does essentially the same. Neither changes the following realities:

- The Redistricting Commission's exclusionary criteria must be subject to heightened scrutiny because they burden protected First and Fourteenth Amendment activity.
- The deferential *Anderson-Burdick* framework does not govern this case because the Commission's exclusionary criteria do not concern voting rights or the administration of elections.
- The standards enunciated by the patronage cases—*Elrod*, *Branti*, and *Rutan*—do not apply because the Commission does not exclude partisans, and this is not a challenge to "patronage" requirements.

Ultimately, the Commission's exclusionary criteria fail under both strict scrutiny and *Pickering* exacting scrutiny. Accordingly, Daunt Plaintiffs-Appellants are likely to succeed on the merits and are entitled to a preliminary injunction.

ARGUMENT

I. NEITHER THE *ANDERSON-BURDICK* STANDARD NOR THE "DEFERENTIAL APPROACH" APPLY TO THIS CASE.

The State doubles-down on the District Court's primary mistake, arguing that the *Anderson-Burdick* standard is somehow the appropriate standard to apply in this case. In doing so, the State incorrectly expands the circumstances in which states are afforded *Anderson-Burdick* deference, and it cites inapposite authority. VNP, relying on the same distinguishable authorities as the District Court and the

State, says that if the *Anderson-Burdick* standard does not apply, then this Court should use a "deferential approach" test. Neither test applies to the constitutional freedoms that are being violated here.

The State's position is that this Court should use the *Anderson-Burdick* balancing test because that standard applies to "election-related" regulations. (State Br., Doc. 45, PageID #30-36). But the test's application here is contrary to what any other Circuit Court or the Supreme Court has approved.

As discussed in Daunt Plaintiffs-Appellants' Opening Brief, the *Anderson-Burdick* test does not apply to challenges to *all* "election-related" regulations. The test applies only to election laws relating to the administration of elections that burden voting rights. (Daunt Br., Doc. 39, PageID #27-35); *accord Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008) (Scalia, J., concurring) (the *Anderson-Burdick* test applies only when a court "evaluate[s] a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process . . . ."). Because nothing in this case concerns election administration or the implication of voting rights, *Anderson-Burdick* does not apply.

The State attempts to distinguish this Court's decision in *Moncier v. Haslam*, 570 F. Appx. 553 (6th Cir. 2014), from the current case by noting that it pertained to Moncier's standing, and Moncier relied on *Anderson-Burdick* to

support his claims rather than the government doing so. (State Br., Doc. 45, PageID #31). These are distinctions without a difference. This Court evaluated whether *Anderson-Burdick* applied to Moncier's substantive claims and determined that it had no place in such a challenge. *Moncier*, 570 F. Appx. at 559. The character of the laws challenged in *Moncier* had nothing to do with election administration, and neither do the laws in this case. This Court should again decline to apply *Anderson-Burdick*.

Both the State—urging the *Anderson-Burdick* test—and VNP—urging the "deferential approach" test—rely heavily on *Citizens for Legislative Choice v. Miller*, 144 F.3d 916 (6th Cir. 1998).[1] In doing so, the parties commit the same legal error as the District Court. *Citizens for Legislative Choice* implicated voting rights and the administration of election mechanics. Though Daunt Plaintiffs-Appellants explained this very point in their opening brief (*see* Daunt Br., Doc. 39, PageID #23-24), the State and VNP do not meaningfully address it. It is also important to note that VNP's "deferential approach" is not supported by any case outside of *Citizens for Legislative Choice* or the *Anderson-Burdick* line of cases—

[1] The State argues arguendo that if the *Anderson-Burdick* test does not apply, the "deferential approach" from *Citizens for Legislative Choice* should apply. (State Br., Doc. 45, PageID #57-59). The State is wrong on both accounts. (VNP Br., Doc. 47, PageID #17-30).

neither of which are applicable here. (*See generally* VNP Br., Doc. 47, PageID #17-30).

The State also relies on *Libertarian Party of Ohio v. Wilhem*, No. 2:19-cv-02501, 2020 U.S. Dist. LEXIS 5176 (S.D. Ohio Jan. 13, 2020), to support their erroneous contention that *Anderson-Burdick* applies. (State Br., Doc. 45, PageID #34-35). That court incorrectly applied the *Anderson-Burdick* framework to a challenge to an Ohio law that restricted membership on Ohio's Election Commission to affiliates of the two major political parties. 2020 U.S. Dist. LEXIS 5176, at *4-6; *Contra McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (holding that the *Anderson-Burdick* standard is not the appropriate standard to evaluate the constitutionality of a statute that burdens rights protected by the First Amendment.); *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 493, n. 5 (6th Cir. 1995) (holding that the *Anderson-Burdick* standard "is inappropriate to evaluate the constitutionality of a statute that burdens rights protected by the First Amendment."). In deciding to use the *Anderson-Burdick* standard, the *Wilhem* court cited no authority outside of *Anderson* and *Burdick* themselves, nor did it make any effort to distinguish that case from *McIntyre* or *Briggs*. 2020 U.S. Dist. LEXIS 5176, at *4-6. A case with a similar issue as *Wilhem* is currently before the Supreme Court in *Carney v. Adams*, No. 19-309 (docketed Sep. 6, 2019), on appeal from the Third Circuit. *Adams v. Governor of Del.*, 920 F.3d 878 (3rd Cir. 2019)

cert. granted, 205 L. Ed. 2d 380 (2019). The question there is whether Delaware may limit judges affiliated with any one political party to no more than a bare majority on the state's three highest courts. *Id*. Unsurprisingly, neither the petitioner nor the respondents in that case ask that the Supreme Court apply the *Anderson-Burdick* framework, and the Third Circuit did not cite to *Anderson-Burdick* whatsoever. *Id.*[2]

There are additional reasons *Wilhem* should not be applied here. First, it is an uncontrolling opinion of a magistrate judge. Second, the opinion is unpublished. Third, there is a motion for reconsideration pending in *Wilhem*, plus a notice of supplemental authority regarding the Supreme Court's grant of cert. in *Carney*. Lastly, while some of the Ohio Election Commission's actions in *Wilhem* could arguably be subject to *Anderson-Burdick* standards, the Commission's actions here—redistricting—are not. *See* (Daunt Br., Doc. 39, PageID #34).

Wilhem is also distinguishable, just as the *Elrod* line of cases is distinguishable, because this is not a patronage case. The Commission's exclusionary criteria allow partisans—*i.e.* Republicans, Democrats, and people unaffiliated with either major party—and the Daunt Plaintiffs-Appellants do not challenge the Commission's partisan balance requirements. *See infra* at 8-10.

[2] Even the Campaign Legal Center did not mention *Anderson-Burdick* in their amicus brief filed in *Carney*.

As Daunt Plaintiffs-Appellants noted in their opening brief (Daunt Br., Doc. 39, PageID #32), this case is akin to *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487 (6th Cir. 1995). There, a candidate for Ohio State Representative, Briggs, paid for a billboard that read "Lou Briggs, State Representative, Strong New Leadership." *Briggs*, 61 F.3d at 489. Her opponent filed a complaint with the Ohio Elections Commission, alleging that Briggs violated Ohio Rev. Code § 3599.091(B)(1) (1995), which prohibits candidates from using the title of an office not currently held by the candidate "in a manner that implies that the candidate does currently hold that office, or using the term 're-elect' when the candidate has never been elected . . . ." *Id*. The Ohio Elections Commission found Briggs guilty of violating the statute during a preliminary review hearing. *Id*. at 490. Briggs sued, arguing that the statute violated the First Amendment, both facially and as applied to her, and violated her due process rights under the Fifth and Fourteenth Amendments. *Id*.

The District Court dismissed Briggs's claims under Fed. R. Civ. P. 12(b)(6). The Ohio Elections Commission, like the State here, sought to defend using the *Anderson-Burdick* balancing test. *Id*. at 493. This Court reversed and expressly held that the *Anderson-Burdick* standard "is inappropriate to evaluate the constitutionality of a statute that *burdens rights protected by the First Amendment*" as discussed by the Supreme Court in *McIntyre v. Ohio Elections Comm'n*, 514

U.S. 334 (1995). *Id*. at 493 n.5 (emphasis added) (citing 514 U.S. at 344-46). In so holding, this Court made no distinction between associational rights and speech rights under *Anderson-Burdick*. (State Br., Doc. 45, PageID #32). This should settle the issue.

But why stop there. In *McIntyre* (discussed at Daunt Br., Doc. 39, PageID #31-32), a complainant challenged an Ohio law prohibiting distribution of anonymous campaign literature. 514 U.S. at 337-38. The writing in question was a handbill urging voters to defeat a ballot issue. *Id*. The Ohio Elections Commission, like the State here, relied on *Anderson-Burdick*. *Id*. at 344-46. But the Supreme Court held that *Anderson-Burdick* did not apply because the challenged law was a "regulation of pure speech" and a "direct regulation of the content of speech." *Id*. at 345.

Whether a state law or regulation is "election-related" is not the dividing line for whether a court's review is guided by *Anderson-Burdick*. The *Anderson-Burdick* test applies *only* when a court "evaluate[s] a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process . . . ." *Crawford*, 553 U.S. at 204 (Scalia, J., concurring); (Daunt Br., Doc. 39, PageID #29-34). The inquiry turns on whether the challenged activity involves election administration and the "voting process". *Briggs*, 61 F.3d at 493 n. 5. In the State's view, everything remotely election related is subject to the *Anderson-*

Burdick framework. Such application of *Anderson-Burdick* has no basis in the law and would be impossible to implement given the competing interests in voting rights and election administration that the *Anderson-Burdick* test is meant to address.

II. THIS CASE DOES NOT CONCERN PATRONAGE, SO THE *ELROD-BRANTI-RUTAN* STANDARDS DO NOT APPLY.

Both the State and VNP argue incorrectly—and for the first time on appeal—that this case should alternatively be governed by the standards governing patronage cases developed by *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). (State Br., Doc. 45, PageID #58-63); (VNP Br., Doc. 47, PageID #36-38).

To begin, having failed to raise this issue in the District Court, the State and VNP have waived it. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008) ("an argument not raised before the district court is waived on appeal to this Court").

More substantively, the State and VNP incorrectly equate the Commission's exclusionary criteria to partisan balance requirements. (State Br., Doc. 45, PageID #58-63); (VNP Br., Doc. 47, PageID #36-38) However, in doing so, they gloss

over that this case is different from patronage cases. Indeed, this case is not a patronage case at all. Daunt Plaintiffs-Appellants are not challenging the fact that a certain number of Republicans, Democrats, and individuals unaffiliated with either major party may serve on the Commission. The Commission does not exclude people because they are affiliated with one party or another but rather *mandates* that a certain number of partisans—Republicans and Democrats—serve on it. Daunt Plaintiffs-Appellants are not challenging this requirement.

Daunt Plaintiffs-Appellants' actual argument is that the Commission's exclusionary criteria prohibit participation based on the degree or extent of prior exercise of First Amendment rights. In other words, Daunt Plaintiffs-Appellants are not excluded because they are Republicans. Rather, they are excluded because of the extent to which they previously exercised their First Amendment rights—a much more constitutionally troublesome prohibition. Unlike nearly all patronage cases, the Commission excludes individuals based on activity that occurred over half-a-decade before its establishment, while most partisan-balance requirements challenged under the patronage framework exclude individuals based on concurrent or nearly concurrent party affiliation.

For this proposition, VNP relies heavily on a district court opinion from a different circuit: *Albers-Anders v. Pocan*, 905 F. Supp. 2d 944 (W.D. Wis. 2012). It is telling that VNP points to a singular case that has no precedential or

persuasive effect on this Court. *See, e.g.*, *Bridgeport Music, Inc.*, 410 F.3d at 802 n.16; *Bank of Am., N.A. v. Moglia*, 330 F.3d at 949.

In addition, the portion of the *Albers-Anders* opinion on which VNP relies is incorrect. Even that court noted that "[t]he parties have not cited any cases holding that a public employer may choose not to hire a particular applicant for a nonpartisan position because of the applicant's history of partisan political activity." *Albers-Anders*, 905 F. Supp. 2d at 951. Nor could they: as evidenced by the State and VNP's lack of authority, those cases do not exist. That court just cited an amalgam of patronage cases and cases prohibiting partisan activity while a public employee—circumstances that do not exist here.

Further, the asserted state interest in *Albers-Anders* is different: to maintain "political neutral[ity]" in the position of committee clerk. *Id*. at 950-51. That is not Michigan's interest in the exclusionary provisions because the Commission *must* be made up of a certain number of Republicans and Democrats. The problem here is that the government has put its "thumb on the scale" to determine which "partisans" are "too partisan" to serve. It is impermissible for the government to make judgments about who is "too partisan" based on past First Amendment activity, particularly when those judgments stretch to include individuals who may have had a child working as an office clerk for a nonpartisan lobbyist nearly six years ago.

III. THE SELECTION CRITERIA ARE UNCONSTITUTIONAL.

A. Heightened Scrutiny Applies to Daunt Plaintiffs-Appellants' Claims.

While it is certain that the *Anderson-Burdick* standard and "deferential approach" do not apply, there is no clearly controlling precedent dictating the appropriate level of scrutiny to apply because this is a unique case. Regardless of whether strict scrutiny or exacting scrutiny applies, Daunt Plaintiffs-Appellants are likely to succeed on their claims.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Yet, the Commission's exclusionary criteria punish individuals and their family members for their previous registration as lobbyists. Some courts have applied a strict-scrutiny standard in assessing the constitutionality of laws that burden the right to petition government. *See, e.g.*, *United States v. Harriss*, 347 U.S. 612, 626 (1954) (analyzing a lobbying-disclosure law under a test resembling strict scrutiny); *Minn. State Ethical Practices Bd. v. Nat'l Rifle Ass'n of Am.*, 761 F.2d 509, 511 (8th Cir. 1985) (per curiam) (asking whether a law requiring lobbyists to register and file disclosures served a "compelling" interest); *Brinkman v. Budish*, 692 F. Supp. 2d 855, 862-65 (S.D. Ohio 2010) (applying strict scrutiny

to a law that prohibited former members of the Ohio General Assembly from representing another person or organization before the General Assembly for a period of one year subsequent to their departure from office.). Under strict scrutiny, a challenged law must be narrowly tailored to achieve a compelling governmental interest. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (citing *WRTL*, 551 U.S., at 464 (opinion of Roberts, C. J.)).

The Commission's exclusionary criteria also punish individuals who engage in political speech by excluding former political candidates; officers and leaders of political parties; employees of elected officials, candidates, or political committees; and their family members from participating in the Commission. Courts have applied strict scrutiny to laws that suppress political speech as well. *E.g.*, *Citizens United*, 558 U.S. at 340. Similarly, the Supreme Court has applied strict scrutiny to regulations of the time, place, or manner of protected speech. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Because the Commission's exclusionary criteria burden the right to petition government, suppress political speech, and implicate other constitutional rights, strict scrutiny should apply.

B. The Commission's Exclusionary Criteria Fail Strict Scrutiny.

Under strict scrutiny, a challenged law must be narrowly tailored to achieve a compelling governmental interest. *Citizens United*, at 340. Here, the exclusion of

Plaintiffs-Appellants from eligibility to serve on the Commission acts as an unconstitutional condition on employment because it is both over- and under-inclusive, rather than narrowly tailored. (Daunt Br., Doc. 39, PageID #40-50). Accordingly, the criteria are unconstitutional under the First Amendment.

The State and VNP argue that the exclusionary criteria further Michigan's interest in eliminating undue political influence in redistricting because it is akin to eliminating conflicts-of-interest. *See generally* (State Br., Doc. 45); (VNP Br., Doc. 47). But the exclusionary criteria are both an over-broad and an under-broad method by which to reduce undue political influence and "conflicts-of-interest."[3]

1. The Commission Criteria Are Not Tailored Because They Look To Prior Conduct.

First, the State's and VNP's contention that the exclusionary criteria eliminate conflicts-of-interest dooms the criteria to be both over- and under-broad because they look to prior conduct as well as conduct that is contemporaneous with

[3] There is a serious question as to whether these are the actual state interests. The purportedly "nonpartisan" California Redistricting Commission generated a district map that was far more gerrymandered in favor of Democrats than even a Legislature with Democratic super majorities ever attempted. *See, e.g.*, *Will GOP be fooled again by California Redistricting Commission?*, The Orange County Register (July 13, 2019), available at https://bit.ly/3byOoOA. And the similarly "nonpartisan" Arizona Redistricting Commission was sued for selecting a partisan Democratic firm as mapping consultant and for systematically overpopulating Republican-plurality districts while underpopulating Democrat-plurality districts. *Republicans Challenge Arizona Redistricting*, Courthouse News (May 2, 2012), available at https://bit.ly/37ncAzU.

or subsequent to commission membership. The conflict-of-interest perspective might make sense if the criteria only prohibited those who were *actively* engaged in political conduct from serving on the Commission because that is how conflicts-of-interest work: a person is *presently* bound by two or more competing interests. For example, in legal ethics canon and *habeas corpus* jurisprudence, successive representation does not implicate the same heightened concerns as simultaneous representation. *See, e.g., Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980) ("until a defendant shows that his counsel *actively* represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.") (emphasis added); *Mickens v. Taylor*, 535 U.S. 162, 176 (2002) (noting that Supreme Court has never applied the heightened protections from its conflict-of-interest jurisprudence to cases of successive representation); *accord McFarland v. Yukins*, 356 F.3d 688, 701 (6th Cir. 2004); *Lordi v. Ishee*, 384 F.3d 189, 193 (6th Cir. 2004) (presumed prejudice standard does not apply to successive representation cases).

Why then *must* the Commission exclude individuals who have engaged in protected First Amendment activities as long as six years prior? Someone whose mother worked on a state representative campaign during the 2016 election cycle has no conflict of interest in redistricting. Similarly, someone who was formerly a registered lobbyist 6 years ago (or whose mother was), but who is not currently a

registered lobbyist, has no conflict of interest in redistricting. The exclusionary criteria exclude far more individuals without justification than are necessary to achieve the stated governmental interest.

At the same time, the criteria exclude too few people to achieve their purported interest because they not only allow partisans to serve on the Commission, but also *mandate* that they do so. This is so even though a rank partisan is likely to have considerably more conflicts of interest than someone who might have been a non-partisan lobbyist, or who had a son or daughter employed by such a lobbyist. Accordingly, the exclusionary criteria are not narrowly tailored to further a compelling government interest.

2. The Commission Criteria Are Not Tailored And Under-Inclusive.

Second, the exclusionary criteria are not narrowly tailored because the Commission already prohibits conflicts-of-interest from impacting the Commission through other means. As the State concedes, "Commission members are required to perform their duties 'in a manner that is impartial and reinforces public confidence' in the redistricting process." (State Br., Doc. 45, PageID #39) (citing Mich. Const., Art. 4, §6(10)). The State also concedes that "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." (State Br., Doc. 45, PageID #39-40) (citing 63C

Am. Jur. 2d, Public Officers and Employees, §246; *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.")). If Commissioners are already prohibited from allowing conflicts to influence their actions by a number of different laws, why then is the Commission excluding individuals based on their constitutionally protected activities to avoid "conflicts-of-interest"? Such an application is clearly over-broad. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231-32 (2015) (A law regulating speech is not narrowly tailored if it fails to advance the government's interests; the law is also not narrowly tailored if it is either over- or under-inclusive, and is not the least restrictive means among available, effective alternatives.).

The Commission already contains concurrent restrictions prohibiting incumbents and current candidates from participating, not to mention prospective restrictions on Commission members running for political office after drawing the district lines. These restrictions sufficiently address present conflicts-of-interest, such as Commission members acting in a way to favorably affect their own district lines.

3. The Commission Criteria Are Not Tailored Because They Do Not Exclude.

The Commission's exclusionary criteria are also under-inclusive. In this regard, only partisan candidates and elected officials are excluded. *See* Mich. Const. Art. 4, §6(1)(B). Nonpartisan officials are not excluded from serving on the Commission, but as the State concedes, "[n]onpartisan 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." (State Br., Doc. 45, PageID #47). In Michigan, for example, county and township elected officials are predominantly Republican. Elected officials in cities are predominantly Democrat. The exclusionary criteria prohibit county and township elected officials but allow city elected officials to serve on the Commission. Are major officeholders in the City of Detroit less partisan than a clerk in a rural township? Clearly not. Such curious line drawing suggests motives and interests other than those the State advances. But at a minimum, by the State's own admission, the exclusionary criteria are under-inclusive.

To push their conflict-of-interest narrative, VNP points to *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117 (2011). This case highlights Daunt Plaintiffs-Appellants' points. *Carrigan* dealt with concurrent and prospective conflicts—not previous conflicts—which makes the provisions at issue

there clearly inapposite to the Commission's exclusionary criteria. *Carrigan*, 564 U.S. at 119-120. There, the campaign manager of the public official was seeking official action before the public body on which his candidate / client was *currently* serving.

Finally, the Secretary, in exaggerating its claimed interest in reducing political influence on the redistricting process, repeatedly cites and quotes to the opinion of the United States District Court for the Eastern District of Michigan in *League of Women Voters of Michigan v. Benson*. (State Br., Doc. 45, PageID #19, 38) (citing 373 F. Supp. 3d 867 (E.D. Mich. 2019), *vacated* 140 S. Ct. 429 (2019) omitting citation to 140 S. Ct. 429). But that opinion was vacated by the Supreme Court on October 21, 2019. *Id*. The Secretary further cites and quotes repeatedly from *Rucho v. Common Cause*, 139 S. Ct. 2484, the very opinion for which *League of Women Voters* was vacated and remanded for further consideration. 140 S. Ct. at 429-30.

C. The Commission's Exclusionary Criteria Also Fail a *Pickering* Analysis.

As a fallback, both the State and VNP argue that if their preferred standards of review are not applicable, this Court should use a *Pickering* analysis. (State Br.,

Doc. 45, PageID #63-65); (VNP Br., Doc. 47, PageID #40-43).[4] But that standard—exacting scrutiny—does not help them.

For starters, it is not clear how *Pickering* could even be applied to the Commission's exclusionary criteria. After all, the *Pickering* balancing test is used "to determine if the employee's free speech interests outweigh the *efficiency interests* of the government as employer." *Scarbrough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 255 (6th Cir. 2006) (quoting *Rose v. Stephens*, 291 F.3d 917, 920 (6th Cir. 2002) (emphasis added). The State and VNP gloss over that *Pickering* balancing is justified not by *any* stated government interest, but government interests in operational efficiency. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 151 (1983); *Schorfhaar v. McGinnis*, NO. 98-1275, 2000 U.S. App. LEXIS 16219, at *11 (6th Cir. July 7, 2000). The problem is that the State and VNP do not justify the exclusionary criteria as promoting efficient operation of the Commission, nor could they. At best, as discussed at length above, the exclusionary criteria promote (in over- and under-inclusive ways) an interest in preventing some sort of conflict-of-interest in the redistricting process. Given the choice between *Pickering*'s exacting scrutiny

[4] VNP even goes so far as to argue that Plaintiffs-Appellants' claims should be subject to *both Pickering* and the "deferential approach." As discussed earlier in this brief, the "deferential approach" has no place in this case. *See supra* at 3. (*See also* VNP Br., Doc. 47, PageID #17-30).

and some form of heightened or strict scrutiny, then, it is heightened or strict scrutiny that should be applied.

In addition, the *Pickering* framework was developed for use in cases that involve "*one* employee's speech and its impact on *that* employee's public responsibilities"—a very different context from the present case. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2472 (2018) (emphasis added) (citing *United States v. Nat'l Treasury Emples. Union*, 513 U.S. 454, 467 (1995)). The Commission's exclusionary criteria involve blanket prohibitions based on past First Amendment protected activities. While the Supreme Court has sometimes looked to *Pickering* in examining general rules affecting a range of employees, it has acknowledged that "the standard *Pickering* analysis requires modification in [these kinds of] situation(s)." *Id*. (citing 513 U.S. at 466-68). "A speech-restrictive law with widespread impact," the Supreme Court has said, "gives rise to far more serious concerns than could any single supervisory decision." *Id*. (citing 513 U.S. at 468) (internal quotation marks omitted).

For that reason, "when such a law [*i.e.*, a speech-restrictive law with widespread impact] is at issue, the government must shoulder a correspondingly heavier burden, and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights." *Id*. (cleaned up) (internal citations and quotation marks omitted). These

adjustments result in a test that is more akin to exacting scrutiny than the traditional *Pickering* analysis. *Janus*, 138 S. Ct. at 2458-59, 2465, 2472. Accordingly, if *Pickering* does apply to this case, the appropriate standard would be exacting scrutiny, if not a more demanding standard. *Id*. at 2465 (rejecting application of rational basis review to free-speech jurisprudence and declining to foreclose the possibility that strict scrutiny applies because the scheme at issue could not survive even under exacting scrutiny). *See also generally Nat'l Treasury Emples. Union*, 513 U.S. 454.

Exacting scrutiny is only slightly less demanding than strict scrutiny. Burdens on First Amendment rights must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465. As the Supreme Court instructs:

> Under *Pickering* and later cases in the same line, employee speech is largely unprotected if it is part of what the employee is paid to do, or if it involved a matter of only private concern. On the other hand, when a public employee speaks as a citizen on a matter of public concern, the employee's speech is protected unless the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees' outweighs the interests of the employee, as a citizen, in commenting upon matters of public concern.

Janus, 138 S. Ct. at 2473 (cleaned up) (internal citations and quotation marks omitted). Accordingly, it is exacting scrutiny, rather than the "deferential approach," in which *Pickering* balancing operates in the context of this case.

Here, the Commission's exclusionary criteria fail under exacting scrutiny. Daunt Plaintiffs-Appellants, and those similarly situated to them, have unquestionably spoken on matters of public concern through their previous participation in the political process. The State's interest in preventing "conflicts-of-interest" in the redistricting process is not related to government efficiency because there is no fit. Those interests, even if compelling, can and are achieved through less restrictive means—the conflict-of-interest restrictions embodied in the Commission and other laws, prospective restrictions on Commission members running for political office after they drew the district lines, and concurrent restrictions on incumbents or current candidates.

In sum, the exclusionary criteria are not well suited to avoid conflicts of interest. Other laws, already in place, are well suited. There are no other apparent state interests that are relevant to the analysis. By definition, the exclusionary criteria are not achieving a compelling state interest, and to the extent preventing conflicts of interest is a compelling state interest, it can be—indeed already is—achieved through means significantly less restrictive of associational freedoms. Accordingly, the exclusionary criteria fail under a *Pickering* analysis and Daunt Plaintiffs-Appellants are likely to succeed on the merits of their claims.[5]

[5] Daunt Plaintiffs-Appellants maintain that the remaining preliminary injunction factors continue to weigh in Plaintiffs-Appellants' favor and that the exclusionary criteria are not severable from the Commission's scheme as a whole. They find

CONCLUSION

The Supreme Court has "made clear that, even though a person has no 'right' to a valuable government benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). These reasons include infringement of a person's "constitutionally protected interest, especially his interest in freedom of speech." *Id.* "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Id.* "Such interference with constitutional rights," declares the Court, "is impermissible." *Id.*

The Commission's exclusionary criteria penalize and inhibit Daunt Plaintiffs-Appellants because of their previous exercise of protected speech and associational rights. This, too, is impermissible. Accordingly, Daunt Plaintiffs-Appellants respectfully request that this Court reverse the decision of the District Court and direct the District Court to grant Plaintiffs-Appellants' Motion for Preliminary Injunction.

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nothing in the State's extraordinarily long response brief, nor in VNP's response brief, that sufficiently counsels this Court otherwise.

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I hereby certify that on February 13, 2020, an electronic copy of the foregoing Reply Brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Sixth Circuit, using the appellate CM/ECF system. I further certify that all parties in this case are represented by lead counsel who are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

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