No. 19-2420

In the United States Court of Appeals for the Sixth Circuit

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee,

COUNT MI VOTE, doing business as Voters Not Politicians,

Intervenor-Appellee.

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids, No. 19-cv-00669.
The Honorable **Janet T. Neff**, Judge Presiding.

CORRECTED *AMICUS CURIAE* BRIEF OF BRENNAN CENTER FOR JUSTICE IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

KELLY PERCIVAL
MICHAEL LI
WENDY WEISER
THE BRENNAN CENTER FOR JUSTICE AT NYU
School Of Law
120 Broadway, Suite 1750
New York, NY 10271
(646) 292-8310

ZACHARY D. TRIPP
WEIL, GOTSHAL & MANGES LLP
2001 M Street, NW
Suite 600
Washington, DC 20036
(202) 682-7000
Zack.Tripp@weil.com

STEVEN A. REISS
GREGORY SILBERT
ROBERT B. NILES-WEED
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

COUNSEL PRESS · (866) 703-9373 PRINTED ON RECYCLED PAPER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Brennan Center for Justice at NYU School of Law is a nonprofit, nonpartisan public policy and law institute that seeks to improve systems of democracy and justice. Through its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality, including through work to protect the right to vote and ensure fair and constitutional redistricting practices. The Brennan Center conducts empirical, qualitative, historical, and legal research on electoral practices and redistricting and has participated in a number of redistricting and voting-rights cases.

The Brennan Center has a significant interest in this case, given the Center's longstanding concern about the growth of extreme partisan control over redistricting—a pernicious tactic that deeply offends constitutional principles that form the foundation of our representative democracy. The Brennan Center hopes that its research and perspective

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[1] Pursuant to Rule 29(a)(2), counsel for *amicus curiae* certifies that all parties have consented to the filing of this brief. Pursuant to Rule 29(a)(4), counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. This brief does not purport to convey the position of the NYU School of Law.

will encourage this Court to preserve Michigan's Independent Citizens Redistricting Commission and, in doing so, ensure that independent commissions remain a viable vehicle for states to restore to their voters the power to choose their representatives.

SUMMARY OF ARGUMENT

Free and fair elections—and, by extension, fair districting—are the bedrock of our democracy. Fair districting plans protect "the core principle of republican government ... that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (internal quotations omitted). Extreme partisan gerrymandering turns that principle on its head by letting the political party in charge of line-drawing entrench its power even in wave elections favoring the opposing party.

Michigan's Independent Citizens Redistricting Commission is carefully designed to prevent the extreme partisan gerrymandering that plagued the State in the past. Although Michigan's maps were supposed to be drawn by elected lawmakers in the open give-and-take of the legislative process, the process was often captured by partisan interests,

allowing political operatives a free hand to draw maps. In 2011, this process played out in secret, without public input or public scrutiny, and with map-drawing consultants motivated by the primary goal of securing a large and durable advantage for the political party who hired them. And the maps achieved exactly that, consistently generating electoral outcomes far out-of-step with the preferences of Michigan voters.

Seeking to prevent partisan capture of the redistricting process, Michigan voters overwhelmingly approved a constitutional amendment in 2018 establishing Michigan's Independent Citizens Redistricting Commission. The Commission is designed to be an independent body that will draw fair maps, the opposite of the results produced in the past when partisan interests were able to dominate the map drawing process.

The Commission advances the State's interest in free and fair elections by minimizing the likelihood of extreme partisan gerrymandering. To that end, would-be Commissioners are subject to conflict-of-interest rules that exclude persons who have a stake in the outcome or are otherwise too closely tied to the political process. The Commission also is carefully structured so that it has a balanced mix of voters who self-affiliate with each of the two major parties and persons

not affiliated with either major party. And, as a final safeguard, no redistricting plan can pass unless it wins support from multiple Commissioners in each group. Although partisan affiliation is taken into account in the selection process, it is only for the limited purpose of fulfilling the State's compelling interest in avoiding dominance of the redistricting process by any single party.

In light of Michigan's compelling interest and the Commission's careful design, this Court should reject the meritless attempt of the Michigan Republican Party (the "Party") to create an unprecedented legal right for political parties to control the redistricting process. Michigan law has *never* given political parties a legal interest in redistricting. Under the old system, lawmakers chosen by voters, and not political parties, were responsible for drawing maps. But self-interested partisans operatives captured the old system and manipulated the process to entrench their favored political party in power. The new Commission is designed to prevent that from happening. By contrast, if the Party has its way, not only would political parties have the functional ability to control the redistricting process, they would have a legal and constitutional right to do so.

Michigan had a compelling interest in preventing domination of the redistricting process by partisan interests and in restoring control over electoral outcomes to its voters through fair maps and the Commission is carefully crafted to achieve this purpose. The District Court's opinion should be affirmed.

ARGUMENT

I. Michigan Has a Compelling Interest in Free and Fair Elections that Prevent Elected Officials from Insulating Themselves from Voter Control.

Free and fair elections that allow voters to meaningfully choose their elected representatives lie at the heart of our system of republican government. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019) (recognizing the constitutional "principle that each person must have an equal say in the election of representatives"); *Powell v. McCormack*, 395 U.S. 486, 540–41 (1969) ("[T]he true principle of a republic is, that the people should choose whom they please to govern them." (quoting 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876))); *see also* U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government"). Indeed, it is "the core principle of republican government ... that the voters should choose their

representatives, not the other way around." *Ariz. State Legislature*, 135 S. Ct. at 2677 (internal quotations omitted).

Partisan gerrymandering is incompatible with this bedrock guarantee of elections that allow voters to choose their representatives: When partisan operatives entrench their preferred representatives in power through gerrymandering, elections lose their vitality and effectiveness.

Elections free from partisan gerrymandering give life to at least three core constitutional values: government accountability, legislative representativeness, and neutral treatment of political expression and association. *See* Br. *Amicus Curiae* Brennan Ctr. for Justice, *Rucho v. Common Cause*, Nos. 18-422, 18-726, 2019 WL 1125805, at *13-18 (U.S. Mar. 8, 2019). Extreme partisan gerrymandering, on the other hand, offends all three of these constitutional principles. *See Rucho*, 139 S. Ct. at 2506 ("Excessive partisanship in districting ... is 'incompatible with democratic principles.'" (quoting *Ariz. State Legislature*, 135 S. Ct. at 2586)).

First, elections that provide voters with a meaningful opportunity to choose their representatives ensure that government remains

accountable to the people. As the Supreme Court has acknowledged, "the failure to accord ... legislative representation to all of the State's citizens on a nondiscriminatory basis," results in "frustration of the majority will." *Reynolds v. Sims*, 377 U.S. 533, 576 (1964). Partisan gerrymandering, by making it hard for voter preferences to result in electoral change, erodes this principle of government accountability. Legislators elected from "safe districts need not worry much about the possibility of shifting majorities" and "have little reason to be responsive to political minorities within their district." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 470–71 (2006) (Stevens, J., concurring in part and dissenting in part). The possibility of losing elections, by contrast, ensures that representatives remain sensitive to their constituents' concerns, and allow dissatisfied voters to "clean out the rascals." *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting).

Elections that reflect the actual will of the voters also ensure that legislative bodies look like the states they represent. The Framers believed that as the political mood of the people shifted, so too should the composition of legislative bodies. This, after all, is why the Constitution

mandates elections every two years. But where voters lack the power to oust the representatives who govern them, their government ceases to "think, feel, reason, and act like them." John Adams, Thoughts on Government: Applicable to the Present State of the American Colonies 9 (1776). A legislature whose membership is immune to political winds because its districts have been gerrymandered ceases to be a "portrait of the people at large" and instead becomes government by the minority. *Id.*

Finally, districts that are free from extreme partisan manipulation protect fundamental First Amendment associational and speech rights. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message[.]" *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). This includes individuals' rights "to band together [to promote] candidates who espouse their political views." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). Extreme partisan gerrymandering—which involves the government's intentional burdening of the efficacy of citizens' votes "because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views,"

Vieth v. Jubelirer, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment)—is irreconcilable with those First Amendment principles. *See Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) (recognizing that "significant 'First Amendment concerns arise' when a State purposely 'subject[s] a group of voters or their party to disfavored treatment'" (alteration in original) (quoting *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment)).

In sum, partisan gerrymanders designed to entrench political power and insulate elected officials from the will of the voters effectively undermine the core constitutional values of government accountability, legislative representativeness, and neutral treatment of political expression and association. In the process, these gerrymanders erode the right to free and fair elections in which voters have a meaningful opportunity to select their representatives, a right that the Constitution promises to all voters.

States thus have a compelling interest in promoting redistricting that is free of partisan gerrymandering. As the Supreme Court has explained, a state's interests "in protecting the right of its citizens to vote freely for the candidates of their choice" and "protect[ing] the right to vote

in an election conducted with integrity and reliability … obviously are compelling." *Burson v. Freeman*, 504 U.S. 191, 198–99 (1992). Indeed, the Court expressly commended state efforts to address partisan gerrymandering—including the commission at issue in this case—when it held that partisan gerrymandering raises political questions beyond the reach of federal courts. *See Rucho*, 139 S. Ct. at 2507 ("Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts."). States' compelling interest in eliminating partisan gerrymandering undoubtedly empowers states (if not obliges them) to take action to prevent it.

II. Avoiding Single-Party Control over the Redistricting Process is Critical to Ensuring Free and Fair Elections.

Fair redistricting is essential to realization of the constitutional guarantee of free and fair elections that allow voters to meaningfully choose their representatives. But when lawmakers of a single political party have complete control over the redistricting process, partisan interests are likely to rule the day and manipulate district boundaries to insulate their party's representatives from voter preferences and

entrench their party's political power. Michigan's recent history starkly illustrates this connection between single-party control and extreme partisan gerrymandering and underscores the state's compelling interest in ending partisan domination of redistricting.

A. Single-Party Control over Redistricting Strongly Correlates with Extreme Partisan Gerrymandering.

Where a single political party controls the drawing of electoral maps, there is a powerful temptation for it to draw districts on self-interested lines to keep its representatives in power without regard to the public will. The results can be extreme. As the Supreme Court put it last Term, "Excessive partisanship in districting leads to results that reasonably seem unjust," and the gerrymandering that results "is 'incompatible with democratic principles.'" *Rucho*, 139 S. Ct. at 2506 (quoting *Ariz. State Legislature*, 135 S. Ct. at 2586). Left unchecked, anti-democratic districting will only worsen, as technological advances involving big data and advanced analytics make it easier to draw maps with more extreme and more durable partisan advantage. See *id.* at 2512–13 (Kagan, J., dissenting).

A growing body of evidence shows that single-party control over redistricting strongly correlates with extreme partisan gerrymandering.

See Br. *Amicus Curiae* Brennan Ctr. for Justice, *Gill v. Whitford*, No. 16-1161, 2017 WL 4311106, at *11-17 (U.S. Sept. 5, 2017). Where a single party controls the redistricting process, legislative majorities are more likely to attempt a seat-maximizing gerrymander and are more likely to be successful in that attempt. *See* Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001–02*, 4 St. Pol. & Pol'y Q. 371, 377 (2004) ("[W]hen one party has a veto-proof majority in the state legislature, the process is streamlined and a plan is usually adopted quickly."). Nearly all of the most egregious partisan bias in this past decade's maps occurred in states—including Michigan—where a single political party controlled the redistricting process. *See* Laura Royden & Michael Li, Brennan Ctr. for Justice, *Extreme Maps* 2 (2017) ("*Extreme Maps*").[2]

The abuse of redistricting power is not limited to single-party control, however. Even in states with divided government, party leaders can conspire to draw maps to make each parties' seats safe, hindering

[2] https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16_0.pdf

upstart challengers and preventing unaffiliated or swing voters who are not wedded to one major party or the other from having much influence.

California's 2001 redistricting provides a clear example of this type of bipartisan gerrymander. In California, "Republicans and Democrats in the legislatures settled on turf and carved up the state" to fit their fancy. Laura Royden et al., Brennan Ctr. for Justice, *Extreme Gerrymandering and the 2018 Midterms* 18 (2018) ("*Extreme Gerrymandering*").[3] That effort was extraordinarily effective: From 1998 to 2008, the incumbent won 458 of 459 (99.8%) legislative and congressional elections. *See* Sasha Horwitz, Ctr. for California Studies, *Redistricting Reform in California: Proposition 11 on the November 2008 California Ballot* 12 (2008).[4]

In contrast to single-party maps, "maps drawn by commissions, courts, and split-control state governments exhibit[ ] much lower levels of partisan bias[.]" *Extreme Maps* at 2. Independent commissions, in particular, have drawn maps that "are considerably more responsive [to voter preference] than those drawn under single party control." *Extreme*

[3] https://www.brennancenter.org/sites/default/files/2019-08/Report_Extreme_Gerrymandering_Midterm_2018.pdf.

[4] http://www.policyarchive.org/collections/cgs/index?section=5&id=95928.

Gerrymandering at 17. California voters approved propositions establishing an independent redistricting commission, for example, which has effectively remedied the extreme incumbent advantage produced by its prior legislature-drawn maps. *See id.* at 17–19. In short, balanced redistricting processes—and, especially, independent redistricting commissions—work.

B. Michigan's Politics and History Underscore the State's Interest in Independent Citizen Control over Redistricting.

1. Michigan's political geography and history give it an unusually strong interest in preventing partisan capture of redistricting. As a politically diverse, swing state, Michigan is especially vulnerable to gerrymandering. In battleground states like Michigan, a near-even mix of Democrats and Republicans means that districts in many parts of the state would naturally be competitive absent partisan manipulation of district lines. But by carefully slicing and dicing and recombining voters, a party can lock in electoral success and protect itself from the "ebbs and flows of politics." *U.S. Trust Co.*, 431 U.S. at 45 (Brennan, J., dissenting). Recent history corroborates this: "With the exception of Texas, all of the most biased maps [including Michigan's] are in battleground states."

Extreme Maps at 2. These states "routinely have close statewide elections and a fairly even distribution of partisanship across most of the state," offering little reason to expect "a large and durable underrepresentation of one political party" absent partisan gerrymandering. *Id.*

2. In 2011, single-party dominance of Michigan's redistricting process resulted in extreme gerrymandering that harmed the State's voters significantly. The three-judge district court opinion in *League of Women Voters of Michigan v. Benson*, offers a revealing summary of Michigan's 2011 process. 373 F. Supp. 3d 867 (E.D. Mich.), *vacated sub nom. Chatfield v. League of Women Voters of Michigan*, 140 S. Ct. 429 (2019) (mem.). As that court put it, "[t]he evidence points to only one conclusion: partisan considerations played a central role in *every aspect* of the redistricting process." *Id.* at 884 (emphasis added).

Michigan's redistricting was controlled by insiders chosen by the leadership of a single party, with no representation or input from the other major party, minor parties, independents, or—most critically—Michigan's citizens. The maps were drawn by "political operatives" hand-picked by one of the major parties (here, Republicans). *Id.* at 883.

Specifically, the congressional maps were manipulated by a "well-known political figure" who had served as Executive Director of the Party from 2005 to 2009 with the aid of the "President for the Michigan Redistricting Resource Institute[,] an organization that [was] formed to 'generate money to finance redistricting litigation' and defend Republican maps." *Id.* The state senate map was drawn by the former Political Director of the Party. *Id.* at 883–884. And the state house map was drawn by the Director of the Party House Campaign Committee. *Id.* at 884.

"[S]unlight is said to be the best of disinfectants" in elections. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) (quoting Louis D. Brandeis, Other People's Money 62 (1933)). But Republican lawmakers and operatives worked in private backrooms cloaked from public scrutiny. Throughout the process, they had private meetings at a law firm's office to discuss their redistricting efforts. *See League of Women Voters*, 373 F. Supp. 3d at 886–87. Republican lawmakers used their personal email addresses (rather than their government accounts) to communicate about their meetings and labeled the agendas "confidential." *Id.* at 887. The mapdrawers, too, held secret meetings at the same law firm where they "strategized about the map-making

process." *Id.* And Republican lawmakers' and mapdrawers' paths often crossed, also in private. See *id.* (explaining that "[t]hroughout the redistricting cycle, the map-makers regularly met with legislative leaders and incumbent Republican legislators"). At those meetings, the mapdrawers showed Republican incumbents drafts of their proposed districts and solicited feedback and changes from the legislators, which they incorporated into later map drafts—that is, the mapdrawers worked with the legislators to enable the legislators to choose their voters. *Id.* at 887–89.

Nor did ordinary voters or lawmakers from other political parties have an opportunity to participate in the districting process. Structurally, the mapdrawers were unconstrained, as "securing enough votes for passage did not necessarily require securing a single vote from a [member of another party] in either chamber." *Id.* at 886. And procedurally, "[e]ven after they formally introduced the redistricting legislation, the Republican-controlled legislature concealed the contents of the redistricting plan and expedited its progression through the legislative process to prevent it from being subject to meaningful public scrutiny." *Id.* at 891. At a "public hearing" on redistricting, copies of the

bill that were provided were merely "a cover and a back sheet [with] nothing in between." *Id.*

Private conversations among Republican leadership, their mapdrawers, and leadership staff show the extent to which partisan representatives and their proxies manipulated the districting process to entrench their own hold on power. On one occasion, the Chief of Staff for a Republican Congressman emailed the mapdrawers with concerns about the latest draft of the Congressman's district. *Id.* at 889. The mapdrawers responded: "[W]e will accommodate whatever [the Congressman] wants." *Id.* at 890. "[W]e've spent a lot of time," the mapmakers went on, "ensur[ing] we have a solid 9-5 delegation"—meaning "nine Republicans and five Democrats"—"in 2012 and beyond." *Id.* In response to another staffer who had asked about the possibility of a 10-4 map, the mapdrawers were not shy about their motives: "[W]e need for legal and PR purposes a good looking map that [does] not look like an obvious gerrymander." *Id.* Yet another staffer spoke approvingly of the proposed map because it was "giving the finger" to a longtime Democratic Congressman. *Id.*

The resulting map worked exactly as designed. Republicans won 9 of 14 congressional seats (64 percent) in three straight elections under the enacted plan, "even though they never earned more than 50.5% of the statewide vote." *Id.* at 892. Elections for the state legislature were even more extreme. "In Michigan's 2014 Senate election," for example, "Republicans earned only 50.4% of the vote but won 71.1% of the seats." *Id.* And in 2018, "despite earning a majority of the votes cast in the House and Senate elections, Democrats remained decidedly in the minority in both chambers." *Id.* at 893. By many measures, Michigan's single-party gerrymander was among the most egregious in the nation. *See Extreme Maps* at 1 ("Michigan, North Carolina, and Pennsylvania consistently have the most extreme levels of partisan bias.").

Michigan's history strengthens its overriding interest in ensuring free and fair elections where the people of the state have a meaningful opportunity to choose their representatives. Michigan's recent experience vividly illustrates the extent to which control over the redistricting process by party leaders and their designees can result in the party essentially choosing for themselves what the outcome of

elections will be for a decade or longer, thereby depriving the people of Michigan of any meaningful vote.

III. Michigan's Independent Commission is Carefully Designed to Restore Voting Power to Michigan Citizens and Thereby Achieve Free and Fair Elections.

On November 6, 2018, Michigan voters overwhelmingly approved an amendment to the Michigan Constitution to create the Independent Citizens Redistricting Commission. The Commission's structure and rules are carefully designed to allow a representative cross-section of ordinary citizens to draw neutral district lines and protect against insidious partisan capture of the redistricting process.

1. To accomplish that goal, the Commission rules impose a series of protections to ensure that the Commission operates transparently, responsively, and free from conflicts-of-interest. The rules insulate the Commission's budget and the Commissioners' salaries from partisan pressure by guaranteeing the necessary funds. Mich. Const. art. IV, § 6(5). And Commissioners and commission staff are barred from soliciting or accepting gifts "which may influence the manner in which [they] peform[ ] [their] duties." § 6(11).

To further protect against real or perceived partisan self-dealing, the rules prohibit partisan officials or closely relatives of such officials from becoming Commissioners. Specifically, the rules exclude officials elected to partisan office or running for the same, § 6(1)(b)(i), (ii); members of the governing body of a political party, § 6(1)(b)(iii); and registered lobbyists, § 6(1)(b)(vi). The rules likewise disqualify employees or close family members (*i.e.*, spouses, parents, and children) of those individuals. § 6(1)(b)(iv), (v), (vi); § 6(1)(c). These limitations thus exclude individuals who could benefit personally or professionally from entrenching a particular individual or party in power or who might be more inclined to be an agent for insider partisan interests.

2. The process by which Commissioners are selected is also designed to promote the Commission's independence by shielding it from political interference and manipulation. First, the Secretary of State makes applications widely available to the public "in a manner that invites wide public participation," including by mailing applications to thousands of randomly selected voters. § 6(2)(a)(i). Once the Secretary has received all applications, she weeds out the incomplete applications and ineligible applicants. § 6(2)(d)(i). From this qualified pool, the

Secretary randomly selects the subset of individuals from which the Commissioners will be chosen, "us[ing] accepted statistical weighting methods to ensure that the pools … mirror the geographic and demographic makeup of the state." § 6(2)(d)(ii). Majority and minority leaders in the Michigan Legislature then have the opportunity to peremptorily strike up to 20 total members of this applicant pool, § 6(2)(e), narrowing it to a final pool. The Secretary then randomly draws the names of the Commissioners from the remaining qualified applicants, § 6(2)(f). This de-politicized selection process ensures that the Commission consists of everyday citizens, rather than operatives or insiders who are selected by party leadership to do the party's bidding.

3. As importantly, the Commission's structure and voting rules are designed to ensure that no one political party or faction can dominate the process. The rules require that Democrats, Republicans, and those not affiliated with either major party all be represented on the Commission. § 6(2)(f). The Amendment further provides that a final district map must have support from a majority of the Commission's members, "including at least two commissioners who affiliate with each major party, and at least two commissioners who do not affiliate with

either major party." § 6(14)(c). This last voting rule ensures that a map cannot be enacted solely on the basis of the votes of Commissioners who self-affiliate with one major party (or even both major parties), and thereby avoids the possibility of a one-party or two-party gerrymander.

It is only to ensure that the balance essential to fair districting exists that applicants must disclose their partisan self-affiliation. Without this information, the random selection of Commissioners could produce a group of Commissioners who all associate with one political party. To guard against that possibility, the rules require Commissioners to self-identify the party with which they affiliate (if any). § 6(2)(a)(iii). The Secretary of State then randomly selects from the pool of qualified applicants four Commissioners who self-affiliate with each of the two political parties with the largest representation in the legislature and five Commissioners who do not self-affiliate with either of the two major parties. § 6(2)(f).

Additional protections exist to prevent abuse of this consideration of partisan self-affiliation. Commission applicants must attest to their self-affiliation under oath, to prevent staunch supporters of one major party from purporting to support the other major party. § 6(2)(iii).

Majority and minority leaders in each house of the Michigan Legislature also have the opportunity to strike any applicant on any basis. § 6(2)(e). These peremptory strikes ensure that legislative leaders can eliminate potential Commissioners whose presence on the Commission they would find particularly objectionable, such as a voter who they believe would seek to unduly entrench the opposite party in power.

The Commission's selection process and voting procedures represent a carefully crafted and intricate response to the dangers of overly self-interested linedrawing and the risk that the process could be dominated by one political party. This careful design would be undermined if the Commissioners overwhelmingly come from one party. To that end, the Commission uses voters' self-identified party affiliations and carefully designed voting rules to ensure that maps are chosen by consensus and not drawn by political factions. Those rules are essential to Michigan's fundamental interest in ensuring free and fair elections for Michigan voters.

IV. The Party Has No Legal Interest—Let Alone a Constitutional Right—in Controlling Who Serves on the Commission.

The Party's various constitutional challenges to the Commission fail, particularly when viewed in light of the State's paramount interest in ensuring that elections are meaningful and enable the people to choose their representatives, rather than an empty exercise where those representatives have all but guaranteed they will remain in power. As a matter of Michigan law, political parties have never had a right to control the redistricting process. Political parties, like the Michigan Republican Party have the same right to participate in the map-drawing process as any Michigan voter or interested organization, no more, no less. Political parties can submit testimony, propose maps, and advocate for their preferred outcomes. But the Party's argument that it should have a *constitutional right* to directly appoint (and presumably control) representatives to the independent body that approves maps not only lacks merit, it is an affront to the principles of democracy that the Constitution actually does protect.

At the outset, for the reasons discussed above, *see supra* at 5–20, the interest motivating Michigan's creation of the Commission is

compelling and indeed fundamental: Voters created the Commission to ensure that elections are fair and meaningful. Indeed, even assuming the Party has stated a cognizable constitutional harm and even if the applicable standard were strict scrutiny—neither of which *amicus* concedes—the Commission's design is carefully crafted to advance Michigan's compelling interest in restoring to the voters the power to choose their own representatives in free and fair elections. It is precisely those interests that Michigan is advancing here. And as described above, the Commission is carefully designed to advance that interest and to ensure that the Commission will draw maps that are fair and neutral and will be perceived as such.

1. The Party's arguments lack merit on their own terms. The Party's central claim that the Commission infringes the Party's freedom of association by depriving it of the right to hand-pick its "standard bearers" on the Commission and to exclude individuals the Party believes do not represent its views, MRP Br. at 5–13, is fundamentally misguided, as it overlooks the Commission's entire raison d'être. The whole point of the Commission is its independence. Its members are chosen at random from the body of the citizenry, rather than appointed by lawmakers or

other party officials. The very aim of the Commission is to protect neutrality and eliminate self-dealing in the map-drawing process by transferring power to ordinary citizens, removing hand-picked operatives from the process, and adopting rules that require impartiality and consensus. The Commissioners are thus decidedly *not* the "standard bearers" of any political party.

The Commission's structure distinguishes this case from *California Democratic Party v. Jones*, 530 U.S. 567, on which the Party heavily relies. *See* MRP Br. at 6. In *Jones*, the Supreme Court considered California's "blanket" primary system, which allowed voters from any party to participate in the selection of another party's nominee for partisan elected office. *Jones*, 530 U.S. at 570. The Court focused on the particular significance of a party's selection of its nominee for elected office to conclude that the blanket primary system infringed the party's associational rights: "In no area is the political association's right to exclude more important than in the process of selecting its nominee." *Id.* at 575. "That process," the Court continued, "often determines the party's positions on the most significant public policy issues of the day." *Id.* At bottom, the Court explained, "[f]reedom of association would prove an

empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." *Id.* at 574 (internal quotations omitted).

Unlike the candidates in *Jones*, the Commissioners here are not "nominees" of a party. Rather, the random selection of everyday citizens as independent commissioners here means that they are just that—a collection of ordinary voters. The Party in turn has no protected associational interest in picking members of the Commission. Conversely, the Commission's structure in no way impedes the Party's associational rights: The Party remains free to use any method it wishes to "nominate" candidates for seats on the Commission. But the Party's choice of a nominee cannot *force the State to select that nominee* as a Commissioner, because seats on the Commission are filled not through a party-nominating process, but instead through random selection drawn from the people as a whole.

It also follows *a fortiori* from *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), that the Commissioners are not "standard bearers" within the meaning of *Jones*. In *Grange*, the Supreme Court upheld Washington's "top two" primary

system, where the top two candidates in the initial round of voting (regardless of party affiliation or preference) would proceed to the general election, and candidates could self-designate their preferred party on the ballot without the approval of party brass. The *Grange* Court distinguished *Jones*, noting that "unlike the California primary [in *Jones*], the [Washington primary] does not, by its terms, choose parties' nominees," because it does not "refer[ ] to the candidates as nominees of any party, nor does it treat them as such." *Id.* at 453. The Court found no basis for concluding that "a well-informed electorate will interpret [an individual's] party-preference designation to mean that the candidate is the party's chosen nominee or representative." *Id.* at 454. And the Court emphasized that the parties could still "nominate their own candidates" through "whatever mechanism they choose," *id.* at 453, even if they could not force the State to put their chosen candidates on the final ballot.

As in *Grange*, although Commissioners may self-identify their party affiliation, Commissioners are not "nominees" in any sense, a well-informed electorate would not perceive them as such, and the Commission's rules do not impede any party's ability to select a nominee. And the Commission is even farther removed from *Jones*, because the

Commissioners are not even candidates for elected office. They are ordinary voters selected to serve on an expressly non-partisan independent commission.

The Party's argument that it must be able to hand-pick Commissioners would not only defeat the primary purpose of the *independent* Commission, but also would run counter to the Supreme Court's expectation that independent redistricting commissions are a valid response to gerrymandering. Although the Supreme Court in *Rucho* held that partisan gerrymandering is a political question beyond the reach of federal courts to adjudicate, the Court made clear that states have the power to fix this acknowledged evil through independent redistricting commissions. Far from "condon[ing] partisan gerry-mandering," the Court recognized that "States [ ] are actively addressing the issue on a number of fronts." *Rucho*, 139 S. Ct. at 2507. The creation of independent redistricting commissions—including Michigan's—and the prescription of neutral districting criteria were two such state efforts the Court expressly commended. *See id.* ("One way" states are limiting partisan influence on districting "is by placing power to draw electoral districts in the hands of independent commissions.").

The Supreme Court has also recognized that independent redistricting commissions "have succeeded to a great degree [in limiting the conflict of interest implicit in legislative control over redistricting]." *Ariz. State Legislature*, 135 S. Ct. at 2676 (internal quotations omitted). Independent commissions, the Court explained, "impede legislators from choosing their voters instead of facilitating the voters' choice of their representatives." *Id.* That is exactly what the State seeks to accomplish here.

2. The Party's viewpoint-discrimination claim—that the Commission's structure favors unaffiliated applicants over those who self-affiliate with the Party—likewise lacks merit. *See* MRP Br. 22–27.

As Defendant-Appellee Voters Not Politicians explains, this argument fails on several grounds. *See* Brief of Defendant-Appellee Count MI Vote d/b/a Voters Not Politicians ("VNP Br.") at 41–45. Rather than forming a unified or homogenous bloc, the unaffiliated commissioners are likely to represent a wide diversity of views—and so are unlikely to unite to suppress the views of self-affiliated Republicans. *Id.* at 41–42. If anything, it is odd to say that the structure disfavors voters who self-affiliate with the Party when four seats are expressly

reserved for Commissioners who self-affiliate with each major party but no seats are reserved for members of smaller political parties (or unaffiliated voters). In any event, the Commission's voting rules ensure that a districting plan must garner broad support. *See supra* at 22–23.

The requirement of balanced self-affiliation is also not constitutionally suspect. Numerous other governmental bodies have analogous structures in place, and the Supreme Court has twice summarily affirmed decisions upholding such structures. *See* VNP Br. at 38–39, 43–44. For example, the Federal Election Commission, the Federal Trade Commission, and the Securities and Exchange Commission, among many others have rules requiring members to disclose their party affiliations and structures requiring partisan balance. *See, e.g.*, 52 U.S.C. § 30106(a)(1) (providing that "[n]o more than 3 members" of the six-member Federal Election Commission "may be affiliated with the same political party"). Other state independent redistricting commissions likewise employ similar structures. *See, e.g.*, Cal. Const. art. 21, § 2(c)(2).

Here, the Commission's structure considers a voter's self-affiliation only in a tightly circumscribed way carefully designed to advance the

State's interest in ensuring fair and meaningful elections. As explained above, the Commission is designed is to have randomly selected voters (not operatives chosen by party leadership) draw a fair map based on neutral criteria. But random selection of voters, standing alone, has an Achilles heel: It could produce a set of Commissioners that consists largely or overwhelmingly of voters who affiliate with a single party (notwithstanding the political balance in the State overall), and in turn take the opportunity to entrench that party into power. Or it could produce a set of Commissioners dominated by voters tied to the major parties, who take the opportunity to engage in a bipartisan gerrymander. Michigan accordingly has a powerful interest in protecting against such results and encouraging impartiality and consensus, and the use of self-affiliation does just that: The Commission does not exclude any voter based on their political views, association with any political party, or voting history; it merely asks voters with which party (if any) they affiliate in order ensure that membership on the Commission is politically balanced. That balance is central to the functioning of rules for approving maps that require that maps win support from Democrats, Republicans, and commissioners who are not affiliated with either major

party. The self-identification, coupled with the map-approval rules, is, in short, a critical aspect of ensuring that the final map is not the product of party domination.

3. Finally, the remaining free speech and associational claims—centered around Commissioner qualifications and disclosure restrictions, *see* MRP Br. 13–22, 27–31—do not raise any significant First Amendment question, as they challenge typical conflict-of-interest and government-transparency rules. To avoid self-dealing, Michigan excludes from consideration individuals who have a potential conflict of interest (or could be perceived as having a conflict of interest) because of connection to an individual political official or party. And to avoid untoward back-room deals, the Commission requires transparency and impartiality from Commissioners. Each of these restrictions is a carefully calibrated response to Michigan's experience in its prior districting processes, advances its core interest in holding free, fair, and meaningful elections, and implicates no constitutional rights.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Dated: February 14, 2020

Respectfully Submitted,

/s/Zachary D. Tripp
Zachary D. Tripp
WEIL, GOTSHAL & MANGES LLP
2001 M Street, NW, Suite 600
Washington, DC 20036
(202) 682-7000
Zack.Tripp@weil.com

Steven A. Reiss
Gregory Silbert
Robert Niles-Weed
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Wendy Weiser
Michael Li
Kelly Percival
THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
(646) 292-8310

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(4) and (5) because this brief contains 6,362 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f). This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: February 14, 2020

/s/Zachary D. Tripp
Zachary D. Tripp
Attorney for *Amicus*
Brennan Center for Justice

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 14, 2020, an electronic copy of the Corrected *Amicus Curiae* Brief of Brennan Center for Justice was filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. The undersigned also certifies that all participants are registered CM/ECF users and will be served via the CM/ECF system.

/s/Zachary D. Tripp
Zachary D. Tripp