Nos. 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.

On Appeal from the United States District Court
for the Western District of Michigan, Southern Division
Honorable Janet T. Neff

RESPONSE OF DEFENDANT-APPELLEE COUNT MI VOTE d/b/a VOTERS NOT POLITICIANS TO PETITION FOR REHEARING *EN BANC*

Graham K. Crabtree
FRASER TREBILCOCK DAVIS & DUNLAP, P.C.
124 W. Allegan
Suite 1000
Lansing, MI 48933
(517) 482-5800

Annabelle E. Harless
CAMPAIGN LEGAL CENTER
55 W. Monroe St.
Suite 1925
Chicago, IL, 60603
(202) 736-2200

Paul M. Smith
Mark P. Gaber
CAMPAIGN LEGAL CENTER
1101 14th St. NW
Suite 400
Washington, DC 20005
(202) 736-2200

Counsel for Defendant-Appellee COUNT MI VOTE d/b/a Voters Not Politicians

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Appellants ask this Court to convene *en banc* because they disagree with one of two standards the panel considered, but declined to actually adopt. They do not challenge the alternative standard. Moreover, Judge Readler, who concurred, agreed Appellants should lose, but would have applied a standard even *more* deferential to Appellees than the one Appellants have focused on. The unique circumstances of this case are near certain never to recur again in this Circuit. Finally, we note that Appellants fail to even to contest the rejection of the bulk of the claims they brought in this case. By its own terms, Appellants' rehearing petition only seeks a different *outcome* with respect to two narrow issues—eligibility criteria they facially challenge based upon hypotheticals that do not apply to them. This is not a case for *en banc* rehearing.

ARGUMENT

I. *En Banc* Review Is Unwarranted Because Appellants' Claims Fail Under Any Potentially Applicable Standard.

En banc review of the panel's decision is unwarranted because Appellants' claims fail under any standard, as the panel unanimously concluded. Appellants focus their rehearing petition on the panel's consideration of the *Anderson-Burdick* test, but the panel did not even hold that *Anderson-Burdick* applies. Rather, the panel assessed Appellants' claims under both the *Anderson-Burdick* test and the unconstitutional-conditions doctrine and concluded it "need not choose between the two" because "the eligibility criteria are constitutional under either." Slip Op. at 9

(quotation marks omitted). That is precisely what this Court did when it upheld Michigan's term limits for legislators over twenty years ago. *See Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 920 (6th Cir. 1998).[1]

Appellants do not challenge the panel's alternative consideration of the unconstitutional-conditions doctrine. Indeed, Appellants do not even challenge the panel's *rejection* of their claims under that framework, except in a narrow regard that is likewise unworthy of *en banc* review. *See infra* Part III. It makes no sense for the Court to sit *en banc* when the test about which Appellants complain was not actually adopted by the panel, and when the *en banc* Court's decision would not alter the panel's judgment.

Appellants cite to the Court's rejection of the *Anderson-Burdick* test in *Moncier v. Haslam*, 570 F. App'x 553 (6th Cir. 2014), and contend that "[t]he character of the laws challenged in *Moncier* is similar to the exclusionary criteria" of Michigan's redistricting commission in that "they both involve the selection of government employees," Pet. at 10. Appellants urge that "[t]he result here should be no different" than in *Moncier*. *Id.* at 11. That is a curious position, if one presumes Appellants wish to win their lawsuit. In *Moncier* the Court rejected the *Anderson-Burdick* test because that test does not "mandate that states organize their

[1] The fact that this Court also considered the *Anderson-Burdick* test in the context of qualifications to be a Michigan official over twenty years ago seriously undermines Appellants' contention that the panel veered from Circuit precedent.

governments in a particular manner . . . or specify how states must fill . . . vacancies." 570 F. App'x at 559. The *Moncier* Court thus affirmed the dismissal of the plaintiffs' claim. On this we agree: "[t]he result here should be no different." Pet. at 10. But rehearing *en banc* is not needed to effect that result.

Appellants likewise contend that the *Anderson-Burdick* test is "overly deferential to the State," Pet. at 12, and rely heavily on Judge Readler's criticisms of that test. But Judge Readler's concurrence does not aid Appellants—he would have applied a test that is *more deferential* to the State. *See* Slip Op. at 37 (Readler, J., concurring) (concluding that the "deferential approach" identified as an alternative in *Citizens for Legislative Choice* might be the "best" framework because it "affords appropriate deference to a state's strong interest in self-governance"). Under that test, a state's sovereign choices regarding the qualifications for important offices must be upheld unless *plainly* in conflict with the federal Constitution. *Citizens for Legislative Choice*, 144 F.3d at 925. That test emphasizes that "[a]s a sovereign, Michigan deserves deference in structuring its government." This is so because "the authority of the people of the States to determine the qualifications of their most important government officials . . . is a power reserved to the States under the Tenth Amendment and guaranteed them by [the Guarantee Clause] of the Constitution." *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991)).

Judge Readler would have upheld the Commission's eligibility criteria under this test. Slip Op. at 37. He likewise took no issue with the panel majority's decision to uphold the eligibility criteria under the unconstitutional-conditions doctrine. Ultimately, all three potential tests identified in the panel's majority and concurring opinions balance the State's interest in structuring its government with Appellants' asserted speech interests.[2] Under all three tests, Michigan's interest in structuring its government prevails, as every federal judge to consider this case has concluded. It matters little what that test is called, and it certainly does not warrant convening the sixteen judges on this Court to decide what to call the balancing test under which Appellants claims must be rejected.

II. *En Banc* Review Is Unwarranted Because the Unique Facts of this Case Are Unlikely to Arise Again.

En banc review is also unwarranted because the unique facts of this case are unlikely to arise again, making the question of whether the *Anderson-Burdick* test applies here doubly unworthy of further consideration. The panel correctly recognized that this is a unique case: "[b]oth the question of the criteria's

[2] Before the panel, Appellants relied upon the D.C. Circuit's decision regarding eligibility of lobbyists to serve on federal advisory committees to urge application of strict scrutiny. *See Autor v. Pritzker*, 740 F.3d 176 (D.C. Cir. 2014). But the D.C. Circuit remanded for application of the *Pickering* test—another balancing test that gives substantial weight to the government's interests. *Id.* at 183-84. Application of the *Pickering* test would do Appellants no good either. *See also* MRP's Appellants' Pet. for Reh'g *En Banc* at 16 (misstating the *Autor* court's holding and offering that misstatement as one of two reasons to grant rehearing *en banc*).

constitutionality and the analytical framework through which to answer this question are matters of first impression not only in this circuit but in the federal courts generally." Slip Op. at 9. These questions are exceedingly unlikely to arise in this Circuit again.

The Sixth Circuit includes Michigan, Ohio, Kentucky, and Tennessee. Ohio voters also adopted redistricting reform in 2018, but the Ohio redistricting commission consists of existing state officeholders or their appointees. Ohio Const. arts. XI & XIX. So the challenge Appellants raise here could not arise in Ohio. Neither Kentucky nor Tennessee permit ballot initiatives, and the odds of either state's legislature voluntarily ceding power to a Michigan-style commission seem vanishingly small.

Because the circumstances of this case have never arisen before (anywhere), and are virtually guaranteed never to arise again in this Circuit, Appellants' concern that "it will be nearly impossible to re-cabin" the *Anderson-Burdick* test because "the genie is out of the published-opinion bottle," Pet. at 12, is misplaced. The panel *itself* cabined the *Anderson-Burdick* test by *declining to actually adopt it*, and instead rejected Appellants' claim under any conceivable framework.[3] It makes no sense to

[3] Appellants' concern that the *Anderson-Burdick* test might come to be used in campaign finance cases, Pet. at 12, is misplaced, considering the Supreme Court's considerable precedent on that issue. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976); *Citizens United v. FEC*, 558 U.S. 310 (2010).

convene the *en banc* Court to consider whether the panel should have excluded from its menu of options one of several potential balancing tests in a case whose facts will not arise again.[4]

III. The Panel's Unanimous Decision Upholding the Family Member Limitation and the Six-Year Waiting Period Does Not Warrant *En Banc* Review.

The panel's unanimous decision to uphold the restriction on family members of disqualified persons serving on the Commission and the six-year waiting period does not warrant *en banc* review. Contrary to Appellants' contention that the panel gave these issues "short shrift," Pet. at 13, the panel carefully considered these issues and the governing case law and unanimously upheld the provisions. The panel correctly recognized that Michigan has a strong interest in preventing the "*appearance* of undue influence," Slip Op. at 16 (emphasis in original), by making ineligible those with recent partisan involvement or close associations with disqualified persons. The Supreme Court has long approved this important state interest. *See U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973) ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public

[4] Judge Readler and Appellants express concern with the *Anderson-Burdick* test generally. *See* Slip Op. at 36 ("I am . . . reluctant to apply *Anderson-Burdick* even in resolving election disputes . . . ."); Pet. at 11-13. But the *en banc* Court has no power to abrogate the Supreme Court cases adopting the *Anderson-Burdick* framework. And this case would be an especially poor vehicle for such an effort.

to be avoiding it."); *Buckley*, 424 U.S. at 27 (noting that the government's interest in preventing the "appearance of corruption" is "[o]f almost equal concern as the danger of actual quid pro quo arrangements" and sufficient to withstand heightened scrutiny, let alone rational basis).

Indeed, the Supreme Court has recognized that states may prevent influence over government decisions by persons whose family members have conflicts of interest. *See Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 119-20, 129 (2011) (upholding Nevada conflicts-of-interest statute that prevented government official from voting on matters for which their family members had a conflict of interest). The Eleventh Circuit has as well. *See Grizzle v. Kemp*, 634 F.3d 1314, 1316, 1325 (11th Cir. 2011) (upholding under rational basis review a statute disqualifying from eligibility to serve on school boards those whose immediate family members serve on school board or in leadership position at schools). Appellants cite no contrary cases. The panel's decision is consistent with the Supreme Court's and other Circuits' precedent and should not be disturbed.[5]

[5] It is also unclear how the "family member" Appellants—Plaintiffs Paul Sheridan and Bridget Beard—even state a First Amendment claim. They are not excluded from the Commission based upon any of *their* prior speech-related activity. Indeed, they object that they are excluded despite *not* personally engaging in partisan activity. Because they have no independent constitutional right to serve as a commissioner, *cf. Rutan v. Republican Party of Ill.*, 497 U.S. 62, 72 (1990), and their eligibility is not conditioned on any of their prior speech-related activity, they have no cognizable First Amendment claim.

Appellants also contend that the panel was wrong to uphold the six-year waiting period, and suggest that a two-year period would be the maximum allowable. Pet. at 15. The Constitution does not draw any such line. Indeed, the Supreme Court has called a two-year waiting period a "*de minimis*"—not a maximal—burden, *Clements v. Fashing*, 457 U.S. 957, 967 (1982), and has upheld a seven-year durational residency requirement for candidates, *id.* (citing *Chimento v. Stark*, 414 U.S. 802 (1973), *summarily aff'g*, 353 F. Supp. 1211 (D.N.H. 1973)). Consider Michigan's legislative term limits upheld by this Court in *Citizens for Legislative Choice*: that law imposes a *forever* waiting period based upon prior partisan political activity. 144 F.3d at 924 (upholding lifetime ban of further service). If it does not offend the Constitution to forever preclude one from a particular government office based upon prior speech-related activity, then it can hardly offend the Constitution to impose a six-year waiting period.

Moreover, none of the *Daunt* Appellants is even affected by the six-year waiting period. Of the fifteen, fourteen are disqualified because of their (or their family member's) *current* positions. Complaint, RE.1, PageID#5-8. One Appellant was a candidate for partisan office through November 2018 but lost, and it is unclear if he has any subsequent disqualifying positions. Beauchine Dec., RE.4-3, PageID#117-18. Appellants acknowledge the state's interest in "eliminating *current* conflicts-of-interest or partisan influence," Pet. at 14 (emphasis in original), and do

not contest the validity of a two-year waiting period, *id.* at 15. Because Appellants acknowledge that *they* are not affected by the six-year waiting period, they can only succeed in a facial overbreadth challenge "by showing that [the law] punishes a 'substantial' amount of protected speech, 'judged in relation to the statute's plainly legitimate sweep . . . ." *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). The overbreadth doctrine is "strong medicine." *Id.* at 119. Plaintiffs must show "from the text" of the law "and from actual fact that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally." *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988). The burden rests on plaintiffs to "produce . . . evidence" of overbreadth. *Connection Dist. Co. v. Holder*, 557 F.3d 321, 340 (6th Cir. 2009) (*en banc*). "The question . . . is not whether a court can conceive of one or more unconstitutional applications of a statute," and "a 'vigorous' enforcement of the 'substantial overbreadth' requirement prohibits a party from leveraging a few [such applications] . . . into a ruling invalidating the law in all of its applications." *Id.* (quoting *Hicks*, 539 U.S. at 122).

Appellants have offered no actual facts and have produced no evidence of real persons who have been unconstitutionally disqualified; instead they pose hypotheticals, such as a spouse "whose husband held office five-and-a-half years ago" and with whom she has "diametrically opposed political views" or "no

knowledge of [his] views." Pet. at 15;[6] *see id.* at 2. This is not enough. *Fifteen* people joined this lawsuit, and admittedly *none* is unconstitutionally affected by the provision. Its sweep is plainly legitimate.

CONCLUSION

"The decision to grant *en banc* consideration is unquestionably among the most serious non-merits determinations an appellate court can make," and "[s]uch a determination should be made only in the most compelling . . . . and rarest of circumstances . . . ." *Mitts v. Bagley*, 626 F.3d 366, 370 (6th Cir. 2010) (Mem.) (Sutton, J., joined by Kethledge, J., concurring in denial of reh'g *en banc*) (quotation marks omitted). If Michigan has a fundamental sovereign right to structure its government, surely it has the right to do so without needing to relitigate about a standard that does not affect the outcome of the case. Appellants' petition for rehearing *en banc* should be denied.[7]

---

[6] Appellants do not explain how this wife whose husband was an elected politician is supposedly unaware of his political views. Nor do these hypotheticals apply to the two "family member" Appellants, who have testified they agree politically with their mother, a state party vice chair. Sheridan/Beard Decs., RE.4-3, PageID#147-51.

[7] Appellants say the Amendment was actually a conspiracy to stack the Commission with Detroit officials elected as nonpartisans, but who are really partisan Democrats. Pet. at 16-17. Nearly 6,000 Michiganders have applied so far to be randomly selected for 13 positions. Republican legislative leaders can strike 10 finalists. If this was a ruse to seat Democratic politicians, then they need to hire a new chief conspirator.

May 29, 2020

Respectfully submitted,

Graham K. Crabtree
FRASER TREBILCOCK DAVIS
& DUNLAP, P.C.
124 W. Allegan, Suite 1000
Lansing, MI 48933
(517) 482-5800

/s/ Paul M. Smith
Paul M. Smith
Mark P. Gaber
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Suite 400
Washington, DC 20005
(202) 736-2200

Annabelle E. Harless
CAMPAIGN LEGAL CENTER
55 W. Monroe Street, Suite 1925
Chicago, IL 60603
(202) 736-2200

Counsel for Defendant-Appellee COUNT MI VOTE d/b/a Voters Not Politicians

CERTIFICATE OF COMPLIANCE

1. This brief complies with the page limitation of this Court's order directing a response because it is 10 or fewer pages.

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

/s/ Paul M. Smith
Paul M. Smith

Counsel for Defendant-Appellee
COUNT MI VOTE d/b/a Voters Not Politicians

CERTIFICATE OF SERVICE

I certify that on May 29, 2020, an electronic copy of the foregoing 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.

/s/ Paul M. Smith
Paul M. Smith

Counsel for Defendant-Appellee
COUNT MI VOTE d/b/a Voters
Not Politicians

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry	Description	Page ID#
1	Daunt Plaintiffs' Complaint and Exhibits	1-49
4-3	Daunt Plaintiffs' Declarations in Support of Motion for Preliminary Injunction	110-154