No. 20-1734

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

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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

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

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

Counsel for Plaintiffs-Appellants

CORPORATE DISCLOSURE STATEMENT

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

By: /s/ Jason Torchinsky
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES AND RULES

OTHER AUTHORITIES

STATEMENT IN SUPPORT OF ORAL ARGUMENT

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

JURISDICTIONAL STATEMENT

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

This appeal involves the United States District Court for the Western District of Michigan's July 6, 2020 Opinion and Order granting motions to dismiss. RE 75, PageID#1036-1069; RE 76, PageID#1070. Appellants brought this action for declaratory and injunctive relief, seeking to have the criteria used to select members of the recently created Michigan Citizens Redistricting Commission declared unconstitutional and invalid, and to enjoin the Michigan Secretary of State from implementing the Commission, including any preparations for the selection of commissioners. On August 3, 2020, Appellants filed their notice of appeal from the District Court's order dismissing their claims. Notice of Appeal, RE 77, PageID#1071-1073. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

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

STATEMENT OF THE CASE

This case concerns the prohibitions by which Michigan disqualifies individuals from serving on the Michigan Citizens Redistricting Commission, an entity that has been assigned the task of drawing Michigan's state and federal legislative districts for future elections. Specifically, the Commission's scheme excludes otherwise-qualified citizens from serving on the Commission simply because of their previous exercise of First Amendment rights, or even their relation to someone who has exercised such rights. Op. and Order Granting Mots. to Dismiss, RE 75, PageID#1039-1044.

Plaintiffs-Appellants are otherwise eligible to become Commission members but are excluded from eligibility. They assert that such disqualification violates their First and Fourteenth Amendment Rights under the United States Constitution. Therefore, the Commission's eligibility criteria are unconstitutional and must be declared invalid, and the Secretary must be enjoined from enforcing those provisions.

Furthermore, the qualification provisions are not severable from the Commission's other provisions. Accordingly, Appellants sought declaratory and injunctive relief from the United States District Court for the Western District of Michigan. Rather than declaring the Commission unconstitutional, or enjoining the

Secretary of State from implementing it or preparing for the selection of commissioners, the District Court granted Defendants' Motions to Dismiss.

Factual Background

The Commission, established by a constitutional amendment passed by a Michigan ballot proposal in November 2018, *see* Mich. Const. art. IV, § 6(1)(B)-(C), (the "Amendment"), is tasked with redrawing Michigan's congressional and state legislative districts every 10 years following the decennial census. Op. and Order Granting Mots. to Dismiss, RE 75, PageID#1037. The Commission is meant to replace the existing legislative redistricting process and eliminate nearly all legislative oversight of that process. *Id*.

The Michigan Secretary of State is responsible for administering the application and selection process for members of the Commission. Mich. Const. art IV, § 6(2). This includes the mailing of applications to at least 10,000 randomly selected registered voters encouraging them to apply. *Id*. at § 6(2)(A). The Secretary of State randomly selects 200 finalists from the qualified applicants, including 60 who self-identify as Republican, 60 who self-identify as Democratic, and 80 who self-identify as unaffiliated with either major political party. *Id*. at § 6(2)(D)(II). To qualify, applicants must be registered and eligible to vote in Michigan. *Id*. at § 6(1)(A). The majority and minority leaders in the Michigan House and Senate may reject up to five applicants each (20 total) before the final

13 Commission members are randomly selected from among the finalists. *Id*. at § 6(2)(E). Commissioners must be selected by September 1 of the year of the census. *Id*. at § 6(2)(F).

Certain activities and associational relationships completely disqualify citizens from serving on the Commission. Relevant to this case, no applicant may become a Commissioner if they are or, in the past *six years*, have been any of the following:

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

Id. at § 6(1)(B), (C). According to the rules listed above, if a parent has a daughter who was employed by a registered lobbyist a half-decade prior to the selection of Commissioners, that parent is barred from serving. Additionally, "[f]or five years after the date of appointment, a commissioner [would be] ineligible to hold a partisan elective office at the state, county, city, village, or township level in Michigan." *Id*. at § 6(1)(E).

The Commission application asks questions to "… make sure you're eligible and don't have any conflicts that would keep you from serving on the Citizens'

Redistricting Commission." State of Michigan, Sec'y of State, *Application for Citizens Redistricting Commission*, https://www.michigan.gov/documents/sos/Michigan__Independent__Citizens_Redistricting_Commission_booklet_669598_7.pdf. The application explains that if the applicant answers "yes" to any one of the following statements, the applicant is "not eligible to serve on the Commission . . .":

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

Id.

The application also asks applicants to state whether they identify with the Democratic Party, the Republican Party, or neither. *Id*. It also provides the applicant with the option of explaining his or her affiliation with the following

question: "Describe why or how you affiliate with either the Democratic Party, the Republican Party, or why you don't affiliate with either." *Id*.

"Commissioner Eligibility Guidelines" posted to the Secretary of State's website illustrate the confusing and contradictory scope of the categories of individuals excluded from eligibility to serve on the Commission.[1] For example, the guidelines specify that a candidate for judge is eligible to serve on the Commission because judicial officers are non-partisan, *id.*, even though some judges in Michigan are nominated on a partisan basis. Another example is that volunteers of elected officials, political candidates, campaigns, or political action committees are eligible to serve on the Commission because volunteers are not paid for their services. *Id.* In contrast, any individual serving as a paid consultant or employee of a non-partisan elected official, non-partisan political candidate, or non-partisan local political candidate's campaign in the preceding six years is ineligible to serve on the Commission because the language of the exclusion is not explicitly limited to partisan offices. *Id.*

Commissioners hold office until the Commission has completed its obligations for the census cycle. Mich. Const. art 4, § 6(18). Commissioners receive compensation equal to at least 25% of the Governor's salary, and the State

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

will reimburse commissioners for costs incurred if the Legislature does not appropriate sufficient funds to cover these costs. *Id*. at § 6(5). As of 2019, Michigan's Governor earns a salary of approximately $160,000 a year, meaning a commissioner will be compensated at least roughly $40,000. State of Michigan, Office of Sec'y of State, *Frequently Asked Questions*, https://www.michigan.gov/sos/0,4670,7-127-1633_91141-488602--,00.html. *See also* Marissa Perino & Dominic-Madori Davis, *Here's the Salary of Every Governor in All 50 US States*, Bus. Insider, (Apr. 20, 2020, 6:02 PM) https://www.businessinsider.com/governor-salary-by-state-2018-1#michigan-22.

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

Procedural History

On July 30, 2019, Plaintiffs-Appellants filed this case against Secretary Benson, in her official capacity, alleging that the Commission's membership-exclusion scheme violates the First and Fourteenth Amendments. Op. and Order Granting Mots. to Dismiss, RE 75, PageID#1045. Appellants are individuals who

are excluded from serving on the Commission because they fall into one or more of the ineligibility categories. *Id*. RE 75, PageID#1045-1048. Appellants include individuals who are current or former declared candidates for local partisan office; incumbents in the Michigan Legislature; partisan precinct delegates; officers and members of the governing bodies of national, state, or local political parties; consultants and employees to candidates for a federal, state, or local office or a political action committee; an employee of the state legislature; a registered lobbyist; an unclassified state employee; and family members of the above listed individuals. *Id*. Appellants each desire to serve on the Commission. *Id*. Thus, each Appellant is excluded from consideration based on prior exercise of First Amendment or associational rights, or even activity they cannot control, such as that undertaken by family members. *Id*.

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

Defendants[2] opposed any injunctive relief and filed motions to dismiss.[3]

On November 25, 2019, the District Court denied Appellants' motion for preliminary injunction. Op. Den. Mot. for Prelim. Inj., RE 67, PageID#926-971; Order Den. Mot. for Prelim. Inj., RE 68, PageID#972-973. This Court affirmed. *Daunt v. Benson*, 956 F.3d 396 (6th Cir. Apr. 15, 2020).

Before Appellants could file a petition for certiorari, the District Court granted Defendants' Motions to Dismiss. Op. and Order Granting Mots. to Dismiss. RE 75, PageID#1036-1069; RE 76, PageID#1070. Although the District Court correctly reiterated that Appellants have standing and that their claims are not barred by laches, *id*. PageID#1052, the District Court adopted portions of this Court's decision in granting Defendants' Motions to Dismiss. *Id*.

The District Court focused its decision first and most heavily on incorrectly applying the *Anderson-Burdick* framework to Appellants' claims, which it dictated "applies to both First Amendment and Equal Protection claims . . . ." *Id*.

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

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

PageID#1058. Using *Anderson-Burdick*, the District Court held that "the eligibility criteria do not impose any 'severe' burden" on Appellants and that Michigan has a compelling and fundamental interest in furthering the eligibility criteria. *Id*. PageID#1058-1059. The District Court rested secondarily on a very brief one-sentence-long application of the unconstitutional-conditions doctrine. *Id*. PageID#1059.

Summary of the Argument

The District Court erred as a matter of law in granting Defendants' Motions to Dismiss because it applied incorrect and overly deferential standards to Appellants' claims. These overly deferential standards allow Defendants' illegal Commission criteria to stand even though they punish people for their exercise of constitutionally protected conduct and, even more astonishing, their relation to someone who exercised such rights. Furthermore, it's not just Appellants' current employment or conduct that the Commission's eligibility criteria targets: its restrictions reach back to protected conduct that took place up to *six years* prior. This lengthy "look back" period even extends in application to anyone who is a "parent, stepparent, child, stepchild, or spouse of any individual" that previously engaged in those activities within the last six years. Mich. Const. art IV, § 6(1)(C). When examined under traditional First and Fourteenth Amendment standards,

these are blatant infringements on constitutionally protected speech and association.

The District Court's principal error is its reliance on this Court's novel application of the *Anderson-Burdick* standard to this case. It is only through its application of *Anderson-Burdick* that this Court and the District Court could determine that the exclusionary criteria passed constitutional muster. The *Anderson-Burdick* standard is deferential to state *election administration* that *burdens voting rights*. But this case does not concern the administration or the mechanics of elections, or the implication of voting rights whatsoever. Contrary to the District Court's alternative holding under the unconstitutional-conditions doctrine, the Commission's exclusionary criteria burden Appellants' protected First and Fourteenth Amendment activity and are subject to heightened scrutiny. Therefore, the District Court should have applied traditional constitutional standards.

Once correct standards are applied to Appellants' claims, it becomes clear that Appellants' claims cannot be dismissed at this stage because Appellants present "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 570 (2007).

ARGUMENT

In dismissing Appellants' claims, the District Court erred as a matter of law.

The standard of appellate review for a motion to dismiss under Rule 12(b)(6) is *de novo*, and this Court employs the same standard as the District Court in conducting that review. *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 443 (6th Cir. 2007); *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 468 (6th Cir. 2005).

To dismiss an action under Rule 12(b)(6), the complaint must fail to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "The moving party has the burden of proving that no claim exists." *Total Benefits Planning Agency, et al. v. Anthem Blue Cross and Blue Shield, et al.*, 552 F.3d 430, 434 (6th Cir. 2008). Factual allegations in the complaint must be presumed to be true, and reasonable inferences must be made in the light most favorable to the non-moving party, *Great Lakes Steel v. Deggendorf*, 716 F.2d 1101, 1105 (6th Cir. 1983), here Appellants. In other words, the complaint need only present "enough facts to state a claim to relief that is plausible on its face" to survive a 12(b)(6) motion. *Twombly*, 550 U.S. at 570. Appellants easily met these burdens here, as described below. The District Court should therefore be reversed.

I. The District Court Erred in Granting Defendants' Motions to Dismiss Because Appellants Have Stated a Claim That the Commission's Criteria Violate the First Amendment.

The District Court erred as a matter of law in determining that the eligibility criteria are constitutional and that Appellants failed to state a plausible claim for relief under the First Amendment.

The District Court's central error is that it again insisted on applying the inapt *Anderson-Burdick* standard—the generally deferential test for election-related claims—rather than traditional First and Fourteenth Amendment standards. Its conclusory determination relied almost exclusively on this Court's decision affirming denial of Appellants' motion for a preliminary injunction, even though Judge Readler's concurrence clarified in no uncertain terms that "the legal framework for reaching [our] conclusion is not the *Anderson-Burdick* test." *Daunt v. Benson*, 956 F.3d 396, 422 (6th Cir. 2020) (Readler, J., concurring).

By contrast, the panel reasoning on which the District Court relied merely stated as a preliminary matter that the criteria were likely constitutional "under *either Anderson-Burdick* or the unconstitutional-conditions doctrine," without conclusively deciding which test was ultimately applicable. *Id.* at 406 ("[W]e need not choose between" the *Anderson-Burdick* or unconstitutional-conditions frameworks.) (emphasis added). Even though the panel's determinations in the alternative at the interlocutory appeal stage essentially amount to dicta at the merits

stage, the District Court evidently decided it was bound (or at least persuaded) by the panel's reasoning under the law of the case doctrine. *See* Order Granting Mot. to Dismiss, RE 75, PageID#1055 ("Here, the Sixth Circuit issued a fully considered appellate decision on the legal issues in this case, a decision that this Court determines should be given effect in this stage of the litigation.").

But this went too far: the standard to survive a motion to dismiss is a far cry from the significantly more stringent standard that must be met to obtain preliminary relief. *Merck Sharp & Dohme Corp. v. Conway*, No. 3:11-51-DCR, 2012 U.S. Dist. LEXIS 40940, at *12 n.5 (E.D. Ky. Mar. 23, 2012) ("[T]he standard for a motion to dismiss is much lower than that for a motion for preliminary injunction."); *see also Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) ("[P]roof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion"); *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits."). Rather than merely adopting the panel's reasoning on interlocutory appeal without conducting independent analysis, the District Court should have analyzed Appellants' claims under the more lenient motion to dismiss standard. Once the correct constitutional analyses are applied, rather than *Anderson-Burdick*, the result

is clear: Appellants have stated a claim for relief under the First Amendment sufficient to survive a motion to dismiss.

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

In its Opinion granting Defendants' motions to dismiss, the District Court doubled down on its prior determination that the *Anderson-Burdick* framework applies to Appellants' claims. Order Granting Mot. to Dismiss, RE 75, PageID#1058-59. The District Court erred in doing so. The *Anderson-Burdick* test has no place being applied outside the actual administration of elections. As Judge Readler observed regarding this Circuit's decision affirming denial of preliminary relief: "[T]he legal framework for reaching [our] conclusion is not the *Anderson-Burdick* test. *Anderson-Burdick* is tailored to the regulation of election mechanics." *Daunt*, 956 F.3d at 422 (Readler, J., concurring). Judge Readler went on to emphasize:

> Michigan's redistricting initiative does not regulate the mechanics of an election. Far from it, in fact. It simply sets the qualifications for Michigan residents who, if they satisfy certain eligibility criteria and are selected by the Secretary of State, will serve as commissioners who, working together as a commission, will draw electoral districts for the State, districts in which as-yet-unknown candidates will seek legislative office in a general election, following party primaries.

Id. Indeed, the Supreme Court and this Circuit have already rejected the contrary argument. Since this case does not involve administration of any election, *Anderson-Burdick* does not apply.

The *Anderson-Burdick* test is a balancing test the Supreme Court articulated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and advanced in *Burdick v. Takushi*, 504 U.S. 428 (1992). Courts use this test as a "flexible standard" when a plaintiff alleges that a state has burdened voting rights in the administration of an election. *E.g.*, *Obama for America v. Husted*, 697 F.3d 423, 428-29 (6th Cir. 2012); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 626-627 (6th Cir. 2016). The *Anderson-Burdick* test allows courts to weigh the character and magnitude of the asserted constitutional injuries against a state's interests in regulating elections. *Id*. Such a test makes sense in adjudicating challenges to election regulations because "voting is of the most fundamental significance under our constitutional structure," *Burdick*, 504 U.S. at 433 (citation omitted), but "government must play an active role in structuring elections" to ensure fairness and honesty and avoid chaos during democratic processes. *Id*. Tension between these two interests arises because election laws "invariably impose some burden upon individual voters." Therefore *Anderson-Burdick* provides a framework for courts to determine when election regulations cross the line.

The *Anderson-Burdick* framework applies to challenges to election laws relating to the *administration of elections*—and *only* to those election laws. *Burdick*, 504 U.S. at 433-34; *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015); *Moncier v. Haslam,* 570 Fed. Appx. 553, 559 (6th Cir. 2014);

Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 204 (2008) (Scalia, J., concurring); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("States may, and inevitably must, enact reasonable regulations of *parties*, *elections*, and *ballots* to reduce election- and campaign-related disorder.") (emphasis added) (citing *Burdick*, 504 U.S. at 433).

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

Indeed, a panel of this Circuit found that *Anderson-Burdick* applies only to laws impacting the administration of candidate elections. In *Moncier v. Haslam*, an

individual challenged a plan enacted by the Tennessee General Assembly which governed the selection, evaluation, and retention of judges who serve on the Supreme Court of Tennessee and the state's appellate courts. 570 Fed. Appx. at 553-55. Under that plan, the Governor temporarily filled judicial vacancies by appointment, but those gubernatorial appointees had to run in a retention election to fulfill the remainder of the unexpired term they were serving. *Id*. The plaintiff in that case challenged the appointment/retention plan, alleging that it violated his and the people of Tennessee's First and Fourteenth Amendment rights to ballot access and political association. *Id*. That plaintiff relied heavily on *Anderson-Burdick* in pursuing his First and Fourteenth Amendment claims. *Id*. at 558.

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

The character of the laws challenged in *Moncier* is parallel to the Commissioner selection scheme here. They both involve the selection of

government employees by state officials without regulating the elections of candidates. The character of the challenged law in *Moncier* is the very reason a panel of this Court declined to examine it under *Anderson-Burdick*. *Id*. The same holds true here.

The Supreme Court's decision in *McIntyre v. Ohio Elections Commission* is also instructive. 514 U.S. 334 (1995). The *McIntyre* complainant challenged under the First Amendment an Ohio law that prohibited the distribution of anonymous campaign literature. *Id*. at 337. The writing in question was a handbill urging voters to defeat a ballot issue. *Id*. Ohio relied principally on *Anderson-Burdick* to defend its prohibitions, and the Ohio Supreme Court applied a similar reasoning in its decision below. *Id*. at 343-344. In reversing the Ohio Supreme Court, the Supreme Court flatly rejected this use of *Anderson-Burdick* outside of an election-law context:

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

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

So too here. The operation of the commissioner disqualification scheme does not involve the "voting process itself" or the "mechanics of the electoral process."

Id. at 344-45. It involves First Amendment violations in the Commission's selection of its members. *See also Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 493, n.5 (6th Cir. 1995) (agreeing with the *McIntyre* decision that the *Anderson-Burdick* standard "is inappropriate to evaluate the constitutionality of a statute that burdens rights protected by the First Amendment"); *Tenn. State Conf. of N.A.A.C.P. v. Hargett*, No. 3:19-cv-00365, 2019 U.S. Dist. LEXIS 156812, at *37-39 (M.D. Tenn. Sept. 13, 2019); *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 724-25, (M.D. Tenn. 2019).

The Supreme Court and this Court have applied *Anderson-Burdick* to a variety of laws. *E.g.*, *Crawford*, 553 U.S. 181 (upholding a voter ID law); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008) (upholding Washington's blanket primary law); *Calif. Democratic Party v. Jones*, 530 U.S. 567 (2000) (striking down California's blanket primary law); *Twin Cities Area New Party*, 520 U.S. 351 (upholding a ban on "fusion" candidates); *Burdick*, 504 U.S. at 434-38 (upholding a prohibition on write-in voting); *Anderson*, 460 U.S. at 788-90 (striking down an early filing deadline for independent candidates); *Obama for America v. Husted*, 697 F.3d 423 (finding Ohio law preventing casting of early ballots by non-military voters violative of Equal Protection Clause); *Ohio Democratic Party v. Husted*, 834 F.3d 620 (upholding early voting law). But they

have *never* applied it to laws outside of the election administration and voting rights context before this case.

Tellingly, all the cases cited by Defendants below supporting the use of the *Anderson-Burdick* standard directly involve the processes, procedures, and apparatuses of voting rather than the type of underlying First Amendment burdens implicated by the Commission's exclusionary practices. The reason for this is simple: courts have never applied the *Anderson-Burdick* test in cases directly involving challenges to redistricting plans or redistricting commissions. *See, e.g.*, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (challenge to North Carolina redistricting plan); *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015) (challenge to Arizona independent redistricting commission); *Vieth v. Jubelirer*, 541 U.S. 267, 271-317 (2004) (plurality op.) (challenge to Pennsylvania redistricting plan); *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019) (three-judge panel), *vacating Chatfield v. League of Women Voters*, No. 19-220, 2019 U.S. LEXIS 6515 (Oct. 21, 2019). If courts do not use the *Anderson-Burdick* test to examine direct challenges to redistricting plans or redistricting commissions, how then could they utilize it to examine challenges to selection schemes for redistricting commissioners? *Cf.* Op. and Order Granting Mots. to Dismiss, RE 75, PageID#1058-59. It should not be

done, and indeed, given the competing interests necessitating the *Anderson-Burdick* test, it cannot be done, regardless of the redistricting interests at stake.[4]

Accordingly, *Anderson-Burdick* is not an appropriate framework to apply here. When the correct First and Fourteenth Amendment standards are instead applied, it becomes clear that the District Court erred in granting Defendants' motions to dismiss and should be reversed accordingly.

B. Traditional First Amendment standards govern this case.

Applying a traditional First Amendment analysis to this case shows that Appellants have, at a minimum, stated a claim. Besides its analysis under *Anderson-Burdick*, the District Court dismissed Appellants' unconstitutional-conditions claims with one sentence, relying exclusively on this Court's determination at the preliminary injunction stage. *See* Op. and Order Granting

[4] In its prior opinion denying preliminary relief to Appellants, the District Court relied heavily on *Citizens for Legislative Choice v. Miller*, 144 F.3d 916 (6th Cir. 1998); however, that case remains inapposite here at the merits stage. Op. Den. Mot. for Prelim. Inj., RE 67, PageID#952, 954. In *Miller*, a group of voters and public interest groups challenged a Michigan law that imposed lifetime term limits on state legislators. 144 F.3d at 918-19. Because the plaintiffs were voters and political groups—not the legislative candidates themselves—they were essentially arguing for a right to *vote* for a specific candidate or class of candidates. This Court held that no such right exists and *Anderson-Burdick* applies due to the *voting rights* implicated. *Id*. at 920-21. By contrast, the present case involves free speech and association and how the government is using those characteristics to exclude candidates from a non-elected, government position. Because the law at issue in *Citizens for Legislative Choice* dealt with term limits for elected officials, it truly concerned elections and election administration; not so here, as the Commission's exclusionary requirements involve no elections for the positions at issue. *Citizens for Legislative Choice* is not the appropriate framework to apply in this case.

Mots. to Dismiss, RE 75, PageID#1059. The District Court erred in its conclusion. The Commission's exclusionary criteria are over- and under-inclusive rather than narrowly tailored to serve a vital government interest. Accordingly, the criteria are unconstitutional and should not survive the scrutiny that is warranted.

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

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

representatives." *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

The Supreme Court has also held that "[t]he First Amendment protects political association as well as political expression," *Elrod v. Burns*, 427 U.S. 347, 357 (1976) (plurality op.) (quoting *Buckley v. Valeo*, 424 U.S. 1, 15 (1976)), and that "[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom" of association. *Id.* (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)). As the Court has stated,

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

Id. at 355-58 (internal citations omitted) (some alterations in original).

Moreover, the Supreme Court "has made clear that, even though a person has no 'right' to a valuable governmental benefit, and even though the government

may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 86 (1990) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). The government may not deny benefits to people in a way that infringes their constitutionally protected interests, especially freedom of speech. *Id.* at 86. "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. 'This would allow the government to produce a result which [it] could not command directly.'" *Id*. (citing *Speiser*, 357 U.S. at 526) (alteration in original). Such interference with constitutional rights is impermissible. *Id*.

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

These principles were reiterated more recently by the D.C. Circuit in *Autor v. Pritzker*, 740 F.3d 176 (D.C. Cir. 2014), a case remarkably akin to the present one. In *Autor*, federally registered lobbyists challenged the constitutionality of the

President's decision to ban lobbyists from serving on federal-government advisory committees. *Id*. The D.C. Circuit reversed the district court's dismissal of the claim and held that the lobbyists pleaded a viable First Amendment unconstitutional-conditions claim by alleging that the government conditioned their eligibility for the valuable benefit of committee membership on their willingness to limit their First Amendment right to petition government. *Id*. at 184. By conditioning Appellants' eligibility on their willingness to forgo engaging in First Amendment-protected activity, the Commission does the exact same here. Indeed, even if Appellants stopped their own and their relatives' First Amendment activity tomorrow, it would be years before they would be eligible for Commission membership.

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

protected right.'") (alteration in original) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 n. 10 (1998)); *Connick v. Myers*, 461 U.S. 138, 142 (1983) ("[I]t has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06 (1967) and others); *Keyishian*, 385 U.S. at 606 ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon [government employment]." (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)). Accordingly, conditions of employment that compel or restrain belief and association (*e.g.*, patronage requirements or exclusionary factors based on a person's status within a political party), are inimical to the process undergirding our system of government and are "at war with the deeper traditions of democracy embodied in the First Amendment." *Illinois State Emps. Union v. Lewis*, 473 F.2d 561, 576 (7th Cir. 1972).

To be clear, 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. Appellants are not challenging this partisan-balance requirement.

Appellants' 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, Appellants are not excluded because they are Republicans or Democrats. Rather, they are excluded because of the extent to which they (or their relatives) previously exercised their First Amendment rights—a much more constitutionally troublesome prohibition. Unlike nearly all patronage cases, *see e.g.*, *Elrod*, 427 U.S. 347; *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan*, 497 U.S. 62, 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.

Accordingly, Appellants—who each desire to serve on the Commission but are excluded from consideration—have been denied a benefit based on their prior exercise of constitutionally protected speech and associations. Through the denial of this benefit, Appellants are being punished for no other reason than the exercise of their First Amendment rights, or that of a family member. The Commission's criteria should be subjected to heightened scrutiny.

2. Heightened scrutiny applies to Appellants' claims.

While *Anderson-Burdick*'s "deferential approach" certainly does 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, however, Appellants have met their burden of stating a claim that the Commission's exclusionary criteria do not pass constitutional muster.

"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 *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (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 or heightened scrutiny should apply.

Defendants will likely argue that *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) should instead apply to the Commission's exclusionary criteria rather than strict scrutiny. Appellants disagree. *Pickering* examines whether an "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) (internal quotation marks omitted) (emphasis added). And here, Defendants do not justify the exclusionary criteria as promoting efficient operation of the Commission, but rather preventing conflicts of interest in the redistricting process. Yet even if this Court decides *Pickering* applies, Appellants have stated a claim for relief under that standard.

The Supreme Court has made clear that "the standard *Pickering* analysis requires modification" when examining general rules affecting a range of employees rather than a single employee's speech. *Janus v. AFSCME*, *Council 31*, 138 S. Ct. 2448, 2472 (2018). "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 *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 468 (1995)) (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. Thus, 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* 513 U.S. 454.

Accordingly, Appellants have shown that the exclusionary criteria should be subject to strict or heightened scrutiny, or at the very least a modified "exacting scrutiny" under *Pickering* and *Janus*. The criteria fail under each of those tests because they are not narrowly tailored, as described below.

3. The Commission's exclusions are unconstitutional because they are both over- and under-inclusive and therefore fail under heightened scrutiny.

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

The Supreme Court has made clear that "[u]nder [its] sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so." *Rutan*, 497 U.S. at 78. "[T]he government must demonstrate (1) a vital government interest that would be furthered by its political hiring practices; and

(2) that the patronage practices are narrowly tailored to achieve that government interest."[5] *Vickery v. Jones*, 856 F. Supp. 1313, 1322 (S.D. Ill. 1994).

A law regulating speech is not narrowly tailored if it fails to advance the government's interests; the law is also not narrowly tailored if it is either over- or under-inclusive, and is not the least restrictive means among available, effective alternatives. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231-32 (2015); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121-23 (1991). A law regulating speech is over-inclusive if it implicates more speech than necessary to advance the government's interest(s). *Simon & Schuster*, 502 U.S. at 121-23. An under-inclusive law regulates less speech than necessary to advance the government's interest(s). *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

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

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

Intervening Defendant VNP has stated that the relevant government interest in passing the Amendment was to create "a fair, impartial, and transparent process where voters - not politicians - will draw Michigan's state Senate, state House, and Congressional election district maps."[6] Regarding the exclusion of the eight categories of individuals from eligibility, VNP explained that "[t]he amendment disqualifies these individuals from serving on the Commission because they are *most likely* to have a conflict of interest when it comes to drawing Michigan's election district maps."[7]

The State's exclusion of certain categories of citizens from eligibility based on their exercise of core First Amendment rights, including freedom of speech, right of association, and right to petition the government, is an unconstitutional condition because eligibility for a valuable benefit is conditioned on these citizens' willingness to limit those First Amendment rights. *See Adams v. Governor of Delaware*, 920 F.3d 878 (3d Cir. 2019) (Plaintiff's freedom of association rights were violated by a political balance requirement for Delaware's Supreme Court, Superior Court, and Chancery Court), *cert. granted sub nom., Carney v. Adams*,

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

[7] *Id*., "Who draws the maps?" (emphasis added)

No. 19-309 (Dec. 6, 2019); *Autor*, 740 F.3d at 179. Even assuming the District Court properly relied on the Sixth Circuit panel's reasoning in finding that Michigan has a vital or "compelling" interest in "limiting the conflict of interest implicit in legislative control over redistricting," *see* Op. and Order Granting Mots. to Dismiss, RE 75, PageID#1059, the State failed to narrowly tailor its restrictions to advance these interests.

Michigan's categories of excluded persons are purportedly based on the individual—or an individual's family member—having engaged in activities that reach a certain level of partisanship. In short, the State draws an arbitrary line between certain levels of partisan activity—while some levels of partisan activity are deemed exclusionary (such as being a paid campaign consultant or serving as a precinct delegate), others are not (such as serving as a volunteer for a recognized party, or serving as a mayor in the City of Detroit elected on a "nonpartisan" basis).[8] Embedded in this arbitrary line drawing is the erroneous assumption that it is only elected officials, candidates, people who have been engaged in other political activities or lobbying, and those tied to them by family relationships who

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

have a "personal" or "private" interest in redistricting. These categories are both over- and under-inclusive, regardless of whether the exclusions are designed to eliminate partisanship or private interests. For example, it is impossible to say that the parent of a daughter who is employed by a lobbyist is too partisan to serve but that a volunteer in a political campaign or a "nonpartisan" (but clearly partisan) elected official are not. The exclusionary categories are not narrowly tailored to the government's interest. *Vickery*, 856 F. Supp. 1313 at 1322.

The over- and under-inclusiveness of these categories is readily apparent. For instance, the restriction draws a distinction between registered and unregistered lobbyists, even though the latter's lobbying activities may be far more extensive than the former. If the State believes that a lobbyist's financial interest is compellingly implicated by redistricting, there is no logical justification for distinguishing between registered and unregistered lobbyists. Someone in charge of grassroots lobbying for the League of Women Voters of Michigan would not be required to register as a lobbyist and would therefore not be excluded on that basis, while someone employed by Planned Parenthood as a lobbyist in Lansing would be required to register and would therefore be excluded.

Similarly, paid employees of elected officials, political candidates, campaigns, or political action committees are excluded from eligibility, while

volunteers are eligible to serve on the Commission.[9] Yet an unpaid volunteer may be *more* likely than a disqualified paid consultant to seek employment from a successful candidate and participate in the Commission's activities for partisan reasons.

Furthermore, although Michigan Supreme Court justices are nominated by political parties in an inherently partisan process, current justices (and those who have served on the Supreme Court in the last six years) are not excluded from eligibility to serve on the Commission. Yet the State provides no explanation for the inconsistent treatment between these judges elected in connection with political party operations and other elected officials. Also bafflingly inconsistent is that while township candidates who serve in partisan positions are disqualified, "nonpartisan" city candidates are not.[10] So, a member of the Detroit City Council may serve, *even when supported and endorsed by the Democratic Party*, while a Republican trustee of Macomb Township may not serve.

---

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

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

Particularly egregious is the fact that the Commission excludes individuals who previously engaged in protected First Amendment activities up to *six years* earlier, and even certain members of their family. This exclusion is a remarkably poor fit to achieve Michigan's asserted interests.[11] Someone whose mother worked on a state representative campaign during the 2016 election cycle has no conflict of interest per se in redistricting. Similarly, someone who was formerly a registered lobbyist six years ago (or whose mother was), but who is not currently a registered lobbyist, has no conflict of interest in redistricting. The exclusionary criteria

[11] To illustrate what a weak proxy this six-year look back period is for an individual's current partisanship or party allegiance, this Court need look no further than the regularly shifting political affiliations of several prominent American politicians. *See, e.g.*, Alex Lazar, Anneta Konstantinides, Nicki Rossoll, & Joan E. Greve, *Charlie Crist and 21 Most-Famous Political Party Switchers of All Time*, ABC News (November 5, 2013, 10:02 AM), *available at* https://abcnews.go.com/Politics/charlie-crist-21-famous-political-party-switchers-time/story?id=20788202 (describing how Ronald Reagan changed his political affiliation from Democrat to Republican in 1962, Hillary Clinton changed her affiliation from Republican to Democrat in the early 1970s, Donald Trump switched his affiliation from Republican to "unaffiliated" in 2011, and Arlen Specter changed his affiliation from Republican to Democrat in 2009); Martin Tolchin, *Michigan Senator in Savings Scandal Will Retire*, N.Y. Times (Sept. 29, 1993), *available at* https://www.nytimes.com/1993/09/29/us/michigan-senator-in-savings-scandal-will-retire.html (describing how U.S. Senator Donald Riegle of Michigan switched his party affiliation from Republican to Democrat in 1973 while serving as Representative); Jonathan Martin & Alexander Burns, *Justin Amash Moves Toward a Third-Party Bid for President*, N.Y. Times (Apr. 28, 2020), *available at* https://www.nytimes.com/2020/04/28/us/politics/justin-amash-president.html (describing how U.S. Representative Justin Amash of Michigan changed his affiliation from Republican to Independent in 2019 and Independent to Libertarian in 2020).

exclude far more individuals without justification than are necessary to achieve the stated governmental interest here.

The selection criteria's over-inclusion of individuals engaged in protected activities even more than half a decade prior distinguishes this case from the "trilogy of Supreme Court cases" relied upon by the District Court here. Op. and Order Granting Mots. to Dismiss, RE 75, PageID#1059. For instance, the Hatch Act's prohibition upheld in *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75 (1947) dealt with *current* officers or employees in the executive branch taking active part in political management or political campaigns. *Id.* at 82. The same was true of *United States Civil Service Commission v. National Association of Letter Carriers*. *See* 413 U.S. 548 (1973) (reaffirming *Mitchell*'s holding that the Hatch Act's prohibition of *current* federal employees from taking an active part in "political activity" was constitutional). *Clements v. Fashing*, 457 U.S. 957 (1982) is distinguishable for the same reason. In *Clements*, the challenged sections of the Texas Constitution "prohibited certain officials from holding a seat in the state legislature prior to the expiration of their terms of office, and required an officeholder to resign before running for any other elected office." *Daunt*, 956 F.3d at 411 (discussing the factual background of *Clements*). Again, the prohibitions at issue in *Clements* only pertained to *current* officers, not prior. *See Clements*, 457 U.S. at 959-60. These cases are thus a far cry from the extensive

six-year, post-service period at issue in this case—the fact that the District Court relied almost exclusively on them to show that Appellants' unconstitutional-conditions argument is "squarely foreclose[d]" without grappling with these distinctions is thus highly problematic, and was erroneous. Op. and Order Granting Mots. to Dismiss, RE 75, PageID#1059.

Thus, the fit between the government's asserted interests on the one hand and these categorical restrictions on the other is insufficient to pass constitutional muster; the State cannot justify the distinction the challenged provision draws between Appellants and all other eligible registered voters.

Nor are the Commission's exclusions justified by the stated interests of implementing a "fair, impartial, and transparent redistricting process"[12] because excluding Appellants from the Commission cannot be adequately linked to the achievement of those goals. While other aspects of the Commission can logically be connected to those goals (*e.g.*, prohibiting Commissioners from seeking election into the districts they draw, public meetings, publishing of each redistricting proposal, prohibition on *ex parte* communications with commissioners, prohibition on the acceptance of gifts by the commissioners, requirement of a majority vote for

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

substantive determinations), excluding Plaintiffs from serving on the Commission because of their prior exercise of First Amendment rights cannot.

Perhaps the most startling example of over-inclusiveness is the exclusion of any parent, stepparent, child, stepchild, or spouse of any individual that falls into one of the other excluded categories. There is no basis to disqualify family members as they bear no relationship to the state's purported interest in eliminating individuals who have engaged in the state political process from redistricting decisions, especially family members of these individuals who haven't even engaged in the protected activities half a decade ago. Importantly, the Michigan Attorney General found unconstitutional a statute that prohibited political contributions by family members (including spouses, parents, children, or spouses of a child) of individuals with interest in a casino enterprise. Mich. Att'y Gen. Adv. Op. 7002 (1998). The Attorney General concluded that the family members "bear no relationship to th[e] state's compelling interest." *Id*.; *see also* SEC Rule 206(4)-5, 17 C.F.R. § 275.206(4)-5 (2010) (excluding spouses from "pay to play" rule prohibiting investment advisors making contributions to government officials that influence government entities to whom they provide services). However the State defines its interest, a familial relationship is insufficient to justify denying a citizen his or her constitutional rights. These are but a few examples of the scheme's constitutional shortcomings.

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

Michigan is one of many states that does not maintain voter registration based on political party. So, there is no assurance that an applicant has appropriately declared his or her true political biases, allowing for unchecked manipulation of the system and thus undermining the stated goals of transparency and impartiality. The result is a stark and inappropriate disparity in treatment between Appellants and the vast numbers of citizens who are eligible to serve as commissioners, despite the fact that they are just as personally invested in the outcome of the redistricting process.

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

Thus, the government has no legitimate basis to condition Appellants' eligibility to serve as commissioners on their agreement to forgo constitutionally protected activities—and to have refrained from such activities for years prior to the ballot measure even being proposed—or to penalize them for having family members who exercised those same rights. These categorical exclusions of Appellants from serving on the Commission attach an unconstitutional condition on eligibility because the State may not deny a benefit to a person on a basis that infringes his or her constitutionally protected rights. Because the Commission's

exclusions are both over- and under-inclusive, they fail under either strict or heightened scrutiny.

ii. Alternatively, if exacting scrutiny applies, the Commission's criteria similarly fail.

Exacting scrutiny, in contrast with a traditional *Pickering* analysis, 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. Accordingly, it is exacting scrutiny, rather than the "deferential approach" in which *Pickering* balancing typically operates, that should be applied here.

Here, the Commission's exclusionary criteria similarly fail under exacting scrutiny. Appellants, and those situated similarly 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 be 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 draw 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 that preventing conflicts of interest is a compelling state interest, it can be—and indeed already is—achieved through means significantly less restrictive of associational freedoms.

II. Because the Commission's Criteria Also Violate Equal Protection, The District Court Erred in Dismissing This Action.

The District Court also erred in determining that Appellants failed to state a plausible claim for relief under the Fourteenth Amendment. The Commission's exclusionary criteria also violate the Equal Protection Clause for many of the same reasons that they violate the First Amendment. The criteria burden only individuals that fall into set categories because of an exercise of their First Amendment rights (or their family members' exercise of such rights) while imposing no restriction on individuals who may be just as partisan, or more partisan.

The District Court's analysis of Appellants' equal protection claim is even more sparse than its analysis of Appellants' First Amendment claims. *See* Op. and Order Granting Mots. to Dismiss, RE 75, PageID#1058-59. Again, the District Court relied exclusively on the Sixth Circuit panel's determination at the preliminary injunction stage to inform its determination that Appellants' challenge is squarely foreclosed by Supreme Court precedent. *Id*. This was also error.

As the Supreme Court stated in *Police Department of Chicago v. Mosley*, unlike Equal Protection cases involving protected and non-protected classes, "[t]he Equal Protection Clause requires that statutes *affecting First Amendment interests* be narrowly tailored to their legitimate objectives." 408 U.S. 92, 101 (1972) (emphasis added). The Commission's exclusionary criteria fails this standard. The exclusion scheme draws an unconstitutional distinction between those who

exercise their rights of association and rights to petition the government and those who do not. The exclusions penalize some individuals who engage in lobbying, but impose no sanction at all on other individuals whose "lobbying" activities are much more extensive than those subject to the policy, but who may structure their time so as not to cross registration thresholds.

Further, the Secretary of State has explained in her guidance that paid employees of an elected official, political candidate, campaign, or political action committee are excluded from eligibility, but volunteers are eligible to serve on the Commission because they are not paid for their services.[13] Those same guidelines state that any individual serving as a paid consultant or employee of a nonpartisan elected official, nonpartisan political candidate, or nonpartisan local political candidate's campaign since August 15, 2014, may not be eligible to serve on the Commission. *Id*. Conversely, although Michigan Supreme Court justices are nominated by political parties in an inherently partisan process, they are not excluded from eligibility to serve on the Commission. *Id*. These are but a few examples of the irrational and constitutionally infirm exclusionary categories created by the Amendment.

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

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

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

III. The Entire Commission Should Be Declared Invalid Because the Unconstitutional Provisions Are Not Severable From the Rest of the Amendment.

When the correct legal standards are applied, Appellants have not only stated a claim that the specific exclusionary provisions of the Michigan constitution are unconstitutional, but also that the entire Commission scheme is invalid.[14]

The Amendment itself contains a severability clause:

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

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

[14] Because the District Court erroneously dismissed this action for failure to state a claim under the First and Fourteenth Amendments, it did not address the effect of the severability provision. *See* Op. and Order Granting Mot. to Dismiss, RE 75.

In examining severability, the Michigan Supreme Court has focused on whether severing a particular provision "is not inconsistent with the manifest intent of the legislature[.]"*Constitutionality of 2011 PA 38*, 806 N.W. 2d at 714 (quoting nearly identical severability language from Mich. Comp. Laws § 8.5) (citing *Eastwood Park Amusement Co. v. E. Detroit Mayor*, 38 N.W. 2d 77, 81 (Mich. 1949)). Relevant factors in making this determination include indications that the legislature intended a different severability rule to apply, the remedy requested by the Attorney General, and evidence that the legislature would have adopted the statute even with the knowledge that provisions could be severed. *Constitutionality of 2011 PA 38*, 806 N.W. 2d at 713. This Court has explained that "the law remaining after an invalid portion of the law is severed will be enforced independently 'unless the invalid provisions are deemed so essential, and are so interwoven with others, that it cannot be presumed that the legislature intended the statute to operate otherwise than as a whole.'" *Garcia v. Wyeth-Ayerst Labs*, 385 F.3d 961, 967 (6th Cir. 2004) (quoting *Moore v. Fowinkle*, 512 F.2d 629, 632 (6th Cir. 1975)).

Applying these standards to a constitutional amendment approved by voters through a ballot proposal is challenging because there is little indication of intent, as there is in a legislative record. There is no comparable record of amendments or debate for a successful ballot initiative beyond the binary vote on election day.

Accordingly, when in doubt, courts often presume that ballot provisions are not severable, leaving it to future voters to decide whether they want to keep a ballot measure that is missing invalidated provisions.

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

In making this severability inquiry, the fundamental question is intent. In *Minnesota. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), the

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

Here, Ballot Proposal 2's wording specifically states that the proposed amendment would "[p]rohibit partisan officeholders and candidates, their employees, certain relatives, and lobbyists from serving as commissioners."[15] Further, the language of the accompanying draft amendments—which were provided to voters with the ballot proposal—provided specific details of the exact categories of individuals that would be ineligible to serve on the Commission.[16] Consequently, the voters were aware of the specific categories of individuals that were deemed to be "too partisan" in nature, and thus excluded from eligibility in order to accomplish the stated objective of "prohibit[ing] partisan[s] . . . from serving as commissioners."[17] In voting "yes" on the proposal, Michigan voters likely believed that such restrictions were a vital part of the overall proposal and

[15] Voters Not Politicians, *Proposal 2 – 100 Word Summary*, https://votersnotpoliticians.com/language/.

[16] *Id*.

[17] *Id.*

thus not severable. To the extent the voters' intent is ambiguous, this Court should follow the lead of the Michigan and U.S. Supreme Courts and presume that the measure would not have passed but for the inclusion of the exclusionary criteria.

Further, the exclusionary factors play an essential role in accomplishing the goal that the Commission was designed to achieve—and in VNP's campaign to persuade voters to adopt Proposal 18-2—and therefore is so interwoven with the other provisions that it cannot be presumed that voters would have intended the Commission to exist without those provisions. *See Wyeth-Ayerst Labs*, 385 F.3d at 967. Indeed, the exclusionary factors are essential to the Commission's intended functioning. This intent was embodied in the ballot proposal's summary, which stated that the proposed amendment would "[p]rohibit partisan officeholders and candidates, their employees, certain relatives, and lobbyists from serving as commissioners." *Id.* The language of the accompanying draft amendments provided specific details of the exact categories of individuals that would be ineligible to serve on the Commission. *Id*. The voters were aware of the specific categories of individuals that were excluded from eligibility in order to accomplish the stated objective of "prohibit[ing] partisan[s] . . . from serving as commissioners," and the courts should assume that these exclusions mattered to voters. *Id*.

In sum, Appellants have not only met their burden of stating a claim that the Commission's selection criteria are unconstitutional and invalid, but also the Commission in its entirety should be declared invalid. This is because the unconstitutional provisions are not severable from the rest of the Amendment; *i.e.*, it is not possible to say that Michigan voters would have approved the ballot measure but for VNP's decision to include unconstitutional commissioner criteria.

CONCLUSION

No government may condition eligibility for employment on an applicant's willingness to give up constitutionally protected speech and associational activities. That prohibition applies doubly when the government excludes applicants based on the protected speech and associational activities of those applicants' family members. The Founders would be astonished at the brazen attempt to bar someone from a government position simply because they have a parent or child who happens to work for the wrong person. All the Commission's eligibility exclusions are unconstitutional.

Furthermore, Michigan voters would likely not have approved a ballot initiative without the unconstitutional exclusions. Notwithstanding the proposal's attempt to insulate itself from a severability analysis, this Court should hold that the eligibility requirements are not severable.

Accordingly, Appellants respectfully request that this Court reverse the decision of the District Court and remand with instructions to 1) declare the Michigan Citizens Redistricting Commission unconstitutional and invalid in its entirety, and 2) enjoin the Michigan Secretary of State from implementing the Commission.

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

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

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

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 6 Cir. R. 32(b) because it contains 12,330 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

By: /s/ Jason Torchinsky
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2020, an electronic copy of the foregoing Opening Brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Sixth Circuit, using the appellate CM/ECF system. I further certify that all parties in this case are represented by lead counsel who are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

By: /s/ Jason Torchinsky
Attorney for Appellants

ADDENDUM

TABLE OF CONTENTS

DESIGNATION OF RELEVANT LOWER-COURT DOCUMENTS

RE	Description	Page ID #
1	Complaint	1-32
4	Motion for Preliminary Injunction	53-92
27	Motion to Consolidate	314-319
30	Order Granting Motion to Consolidate	333-335
39	Opposition to Preliminary Injunction	532-533
67	Opinion Denying Motion for Preliminary Injunction	926-971
68	Order Denying Motion for Preliminary Injunction	972-973
75	Op. and Order Granting Mots. to Dismiss	1039-1044
77	Notice of Appeal	1071-1073

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

Sec. 6. (1) An independent citizens redistricting commission for state legislative and congressional districts (hereinafter, the "commission") is hereby established as a permanent commission in the legislative branch. The commission shall consist of 13 commissioners. The commission shall adopt a redistricting plan for each of the following types of districts: state senate districts, state house of representative districts, and congressional districts. Each commissioner shall:

(a) Be registered and eligible to vote in the State of Michigan;

(b) Not currently be or in the past 6 years have been any of the following:

(i) A declared candidate for partisan federal, state, or local office;

(ii) An elected official to partisan federal, state, or local office;

(iii) An officer or member of the governing body of a national, state, or local political party;

(iv) A paid consultant or employee of a federal, state, or local elected official or political candidate, of a federal, state, or local political candidate's campaign, or of a political action committee;

(v) An employee of the legislature;

(vi) Any person who is registered as a lobbyist agent with the Michigan bureau of elections, or any employee of such person; or

(vii) An unclassified state employee who is exempt from classification in state civil service pursuant to article XI, section 5, except for employees of courts of record, employees of the state institutions of higher education, and persons in the armed forces of the state;

(c) Not be a parent, stepparent, child, stepchild, or spouse of any individual disqualified under part (1)(b) of this section; or

(d) Not be otherwise disqualified for appointed or elected office by this constitution.

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

(2) Commissioners shall be selected through the following process:

(a) The secretary of state shall do all of the following:

(i) Make applications for commissioner available to the general public not later than January 1 of the year of the federal decennial census. The secretary of state shall circulate the applications in a manner that invites wide public participation from different regions of the state. The secretary of state shall also mail applications for commissioner to ten thousand Michigan registered voters, selected at random, by January 1 of the year of the federal decennial census.

(ii) Require applicants to provide a completed application.

(iii) Require applicants to attest under oath that they meet the qualifications set forth in this section; and either that they affiliate with one of the two political parties with the largest representation in the legislature (hereinafter, "major parties"), and if so, identify the party with which they affiliate, or that they do not affiliate with either of the major parties.

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

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

(d) By July 1 of the year of the federal decennial census, from all of the applications submitted, the secretary of state shall:

(i) Eliminate incomplete applications and applications of applicants who do not meet the qualifications in parts (1)(a) through (1)(d) of this section based solely on the information contained in the applications;

(ii) Randomly select 60 applicants from each pool of affiliating applicants and 80 applicants from the pool of non-affiliating applicants. 50% of each pool shall be populated from the qualifying applicants to such pool who returned an application mailed pursuant to part 2(a) or 2(b) of this section, provided, that if fewer than 30 qualifying applicants affiliated with a major party or fewer than 40 qualifying non-affiliating applicants have applied to serve on the commission in response to the random mailing, the balance of the pool shall be populated from the balance of qualifying applicants to that pool. The random selection process used by the

secretary of state to fill the selection pools shall use accepted statistical weighting methods to ensure that the pools, as closely as possible, mirror the geographic and demographic makeup of the state; and

(iii) Submit the randomly-selected applications to the majority leader and the minority leader of the senate, and the speaker of the house of representatives and the minority leader of the house of representatives.

(e) By August 1 of the year of the federal decennial census, the majority leader of the senate, the minority leader of the senate, the speaker of the house of representatives, and the minority leader of the house of representatives may each strike five applicants from any pool or pools, up to a maximum of 20 total strikes by the four legislative leaders.

(f) By September 1 of the year of the federal decennial census, the secretary of state shall randomly draw the names of four commissioners from each of the two pools of remaining applicants affiliating with a major party, and five commissioners from the pool of remaining non-affiliating applicants.

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

(a) Death or mental incapacity of the commissioner;

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

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

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

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

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

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

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

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

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

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

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

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

(11) The commission, its members, staff, attorneys, and consultants shall not discuss redistricting matters with members of the public outside of an open meeting of the commission, except that a commissioner may communicate about redistricting matters with members of the public to gain information relevant to the performance of his or her duties if such communication occurs (a) in writing or (b) at a previously publicly noticed forum or town hall open to the general public.

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

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

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

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

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

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

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

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

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

(g) Districts shall be reasonably compact.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Transfer of powers: See MCL 16.132.

Moncier v. Haslam

United States Court of Appeals for the Sixth Circuit

June 30, 2014, Filed

File Name: 14a0469n.06

Case No. 14-5324

Reporter
570 Fed. Appx. 553 *; 2014 U.S. App. LEXIS 12696 **; 2014 FED App. 0469N (6th Cir.); 2014 WL 2958429

HERBERT SANFORD MONCIER, Plaintiff-Appellant, v. BILL HASLAM, Governor of the State of Tennessee; MARK GOINS, Tennessee Coordinator of Elections, Defendants-Appellees.

Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Subsequent History: US Supreme Court certiorari denied by *Moncier v. Haslam, 2014 U.S. LEXIS 8319 (U.S., Dec. 15, 2014)*

Prior History: **[**1]** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE.

Moncier v. Haslam, 1 F. Supp. 3d 854, 2014 U.S. Dist. LEXIS 26434 (E.D. Tenn., 2014)

Case Summary

Overview

HOLDINGS: [1]-The challenger lacked standing because the injuries of which he complained were not concrete and particularized, but rather generalized and abstract, involving questions of wide public significance to all Tennesseans; [2]-The challenger made no effort to distinguish his claims under the *First* and *Fourteenth Amendments*, and the crux of his complaint was that Tennessee voters could not, in all instances, elect the judges of the state's appellate courts, and the injury was plainly undifferentiated and common to all members of the public; [3]-There was no federally protected interest in seeking a state-court judgeship that, under state law, already had been lawfully filled by gubernatorial appointment; [4]-Defendant's other arguments were not preserved for appeal.

Outcome

Judgment affirmed.

Counsel: For Herbert Sanford Moncier, Plaintiff - Appellant: Herbert Sanford Moncier, Law Offices of Herbert S. Moncier, Knoxville, TN.

For BILL HASLAM, Governor of the State of Tennessee, MARK GOINS, Tennessee Coordinator of Elections, Defendants - Appellees: Janet M. Kleinfelter, Senior Counsel, Office of the Tennessee Attorney General, Nashville, TN.

Judges: BEFORE: MERRITT, COLE, and WHITE, Circuit Judges.

Opinion by: COLE

Opinion

[*553] COLE, Circuit Judge. In 1994, the Tennessee General Assembly enacted a plan for the selection, evaluation, **[*554]** and retention of judges who serve on the Supreme Court of Tennessee and the state's appellate courts ("the Tennessee Plan"). Under the Tennessee Plan, the Governor may temporarily fill judicial vacancies by appointment, but those gubernatorial appointees must then run in a retention election to fulfill the remainder of the unexpired term they are serving. Herbert Moncier, proceeding pro se, brought suit under *Section 1983*, challenging the Tennessee Plan on the grounds that it violates his (and the people of Tennessee's) *First* and *Fourteenth Amendment* rights to ballot access and political association. The **[**2]** district court dismissed Moncier's suit due to lack of standing after determining that he alleged, at most, a generalized grievance involving an abstract question of wide public significance. For similar reasons, we affirm.

I. BACKGROUND

This appeal involves a challenge to the constitutionality of *Tennessee Code §§ 17-4-101 through 17-4-116*, known commonly as the Tennessee Plan, which governs the way in which judges of the Tennessee appellate courts are initially selected and thereafter stand for election. By now, the Tennessee Plan is no stranger to legal challenge, both at the federal and state level. *See, e.g., Johnson v. Bredesen, 356 F. App'x 781 (6th Cir. 2009)* (affirming district court's dismissal of a federal constitutional challenge to the Tennessee Plan as it related to the election of state supreme court justices); *Hooker v. Haslam, No. M2012-01299-SC-R11-CV, 437 S.W.3d 409, 2014 Tenn. LEXIS 195, 2014 WL 1010367 (Tenn. Mar. 17, 2014)* (holding that the Tennessee Plan, as it relates to state appellate-court judges, does not violate the state constitution).

The Tennessee Plan provides that if a vacancy occurs in the office of an appellate-court judge by death, resignation, or otherwise, the Governor shall fill the **[**3]** vacancy by appointing one of the three persons nominated by the Judicial Nominating Commission ("JNC").[1] *Tenn. Code § 17-4-112(a)(1)*.

[1] Though not relevant to this appeal, the Tennessee General Assembly amended the Tennessee Plan to terminate operation of the JNC. *See* Tenn. Code § 4-29-233(a)(15). Following this change in the law, the JNC wound up its business and then ceased to exist as of July 1, 2013. *See id. § 4-29-112*. Nevertheless, the appointments at issue in this appeal were all filled with the assistance of the JNC prior to winding up its affairs, and the Tennessee Plan remains

Likewise, if an incumbent appellate-court judge determines not to seek retention for another term, the Tennessee Plan provides that a vacancy occurs in that office upon the expiration of the incumbent's term, effective September 1. *Id.* § 17-4-116(a). In such event, the Governor may fill the vacancy under the procedures outlined in §§ 17-4-112 or 17-4-113, but the Governor's appointee must then stand for a retention election at the next August general election to fill the remainder of the unexpired term. *Id.* § 17-4-116(a).

On May 24, 2013, Judge Joseph Tipton **[**4]** of the Tennessee Court of Criminal Appeals notified Governor Bill Haslam that he would not seek retention for another term in the August 2014 election. The JNC then issued notice that it was accepting applications to fill the vacancy Judge Tipton's decision would create and subsequently held a public hearing to interview interested candidates and to allow public comment on the qualifications of the applicants. The JNC ultimately submitted several names to the Governor, and from those names, the Governor selected Robert H. Montgomery to fill the vacancy. Thus, under the Tennessee Plan, Montgomery **[*555]** will fill the vacancy created upon the expiration of Judge Tipton's term, effective September 1, 2014, but Montgomery must run in an August 2016 retention election (involving a simple yes-or-no vote) to be eligible to serve the remainder of that term. *See id.* § 17-2-116(a).

Herbert Moncier, the plaintiff in this suit, wishes to fill Judge Tipton's position on the Tennessee Court of Criminal Appeals. He did not, however, submit an application to the JNC to be considered for the seat, nor did he appear at the public meeting or otherwise comment on the qualifications of the actual applicants. Moncier **[**5]** instead requested that Mark Goins, the State Coordinator of Elections, place his name on the August 2014 ballot as a candidate for the office. Coordinator Goins denied Moncier's request and directed him to the "Tennessee statutes that provide for the manner judges are appointed and stand for election in Tennessee."

Moncier filed this suit in federal district court against Governor Haslam and Coordinator Goins, seeking a declaration that the Tennessee Plan is unconstitutional. Moncier alleged that, in implementing the Tennessee Plan to fill Judge Tipton's seat, the defendants are violating his *First* and *Fourteenth Amendment* rights under the United States Constitution by denying him access to the August 2014 ballot and the right to political association.

The defendants answered Moncier's complaint and requested that the district court dismiss the suit, citing a lack of subject-matter jurisdiction because Moncier purportedly lacked standing. On December 6, 2013, Moncier filed an application for a temporary injunction directing Coordinator Goins to provide him with a nomination petition for the office of judge of the Tennessee Court of Criminal Appeals and to provide him with instructions **[**6]** on how many nominating signatures are required, from which counties those signatures are required, and the deadline for filing a nominating petition. Moncier also filed several motions to amend his complaint and his motion for temporary injunctive relief. The district court did not rule on these individual motions prior to dismissing the suit.

On February 28, 2014, the district court issued a memorandum opinion dismissing Moncier's complaint and denying his motion for a temporary injunction. *Moncier v. Haslam, No. 3:13—CV-630—TAV—HBG, 1 F. Supp. 3d 854, 2014 U.S. Dist. LEXIS 26434, 2014 WL*

substantively unchanged in all other respects.

806418, at *8 (M.D. Tenn. Feb. 28, 2014). The court determined that Moncier had failed to establish the constitutional minimums for standing based on his First and Fourteenth Amendment claims. 2014 U.S. Dist. LEXIS 26434, [WL] at *3-7. "At bottom," the court reasoned, "[Moncier's] complaint is a generalized grievance that involves abstract questions of wide public significance," and not a request for relief from a concrete and particularized injury, as required for Article III standing. 2014 U.S. Dist. LEXIS 26434, [WL] at *5 (citation and internal quotation marks omitted). Accordingly, the district court dismissed Moncier's complaint and denied his motion for a temporary injunction due to lack of subject-matter **[**7]** jurisdiction. 2014 U.S. Dist. LEXIS 26434, [WL] at *7. Whether for mootness or futility, the district court also denied Moncier's various motions to amend, strike, and supplement his complaint and motion for temporary injunctive relief. 2014 U.S. Dist. LEXIS 26434, [WL] at *8. The court then directed the clerk to close Moncier's case in its entirety. *Id.*

Moncier timely filed a notice of appeal challenging the dismissal of his complaint and an amended notice of appeal challenging the denial of his motion for a temporary injunction. Moncier did not, however, appeal the denial of his motions to amend his other filings. Accordingly, we need not address the claims he presented **[*556]** in those tendered amendments. *See Fed. R. App. P. 3(c)(1)(B)* (requiring notices of appeal to "designate the judgment, order, or part thereof being appealed"); Torres v. Oakland Scavenger Co., 487 U.S. 312, 315, 108 S. Ct. 2405, 101 L. Ed. 2d 285 (1998) (holding that compliance with *Rule 3* is both a "mandatory and jurisdictional" prerequisite to appeal (internal quotation marks omitted)).

II. ANALYSIS

We review de novo the dismissal of a case for lack of standing. Prime Media, Inc. v. City of Brentwood, 485 F.3d 343, 348 (6th Cir. 2007). As the party seeking relief in federal court, Moncier bears the burden of establishing **[**8]** that he has standing. *See* Summers v. Earth Island Inst., 555 U.S. 488, 493, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009).

A. Requirements for Standing

Article III of the United States Constitution restricts the federal judicial power to the resolution of "Cases" and "Controversies." U.S. Const., art. III, § 2. This case-or-controversy requirement is satisfied only where a plaintiff has standing to bring suit. Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 273, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008). To assert Article III standing, a plaintiff must establish the following: "(1) an injury in fact (*i.e.*, a concrete and particularized invasion of a legally protected interest); (2) causation (*i.e.*, a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (*i.e.*, it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief the plaintiff seeks in bringing suit)." *Id.* (brackets, ellipsis, citation, and internal quotation marks omitted). The Supreme Court has described these criteria as the "irreducible constitutional minimum" for bringing suit in federal court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

In addition to the Article III **[**9]** standing requirements described above, federal courts have long imposed prudential limitations on the exercise of their jurisdiction. *See, e.g.,* Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984); Barrows v. Jackson, 346 U.S. 249, 255-56, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953). *But see* Lexmark

Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386-88, 188 L. Ed. 2d 392 (2014) (abrogating a line of prudential-standing cases not relevant to this appeal). Under these prudential limitations, courts should refrain from exercising jurisdiction "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens." *Warth v. Seldin, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)* (citations omitted); *Wuliger v. Mfrs. Life Ins. Co., 567 F.3d 787, 793 (6th Cir. 2009)*. Moreover, "plaintiff[s] generally must assert [their] own legal rights and interests," without resting their claims on the rights or interests of third parties. *Warth, 422 U.S. at 499*; *Wuliger, 567 F.3d at 793*.

Our standing inquiry focuses primarily on the party bringing suit, and not the merits of the action. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 484, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)*. Nevertheless, this inquiry **[**10]** often depends on the nature and source of the claims and requires a "careful judicial examination of the complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen, 468 U.S. at 752* (asking, among other questions, **[*557]** whether the claimed injury is "too abstract, or otherwise not appropriate to be judicially cognizable"; whether "the line of causation between the illegal conduct and injury is too attenuated"; and whether "the prospect of obtaining relief from the injury as a result of a favorable ruling [is] too speculative"), *abrogated on other grounds by Lexmark, 134 S. Ct. at 1386*.

B. Moncier Lacked Standing to Challenge the Tennessee Plan

After careful consideration of Moncier's constitutional challenge to the Tennessee Plan, the district court determined that he lacked standing because the injuries of which he complained were not "concrete and particularized," but rather "generalized" and "abstract," involving "questions of wide public significance" to all Tennesseans. *Moncier, 2014 U.S. Dist. LEXIS 26434, 2014 WL 806418, at *5—6*. We agree.

We do not write on a blank slate in determining whether Moncier has standing. His suit represents **[**11]** the latest in a long line of cases seeking to upend the Tennessee Plan for one reason or another. *See Hooker, 2014 Tenn. LEXIS 195, 2014 WL 1010367, at *2 n.3* (collecting unsuccessful cases challenging the Tennessee Plan on state and federal constitutional grounds, filed in both state and federal court). Five years ago, we addressed a nearly identical challenge to the Tennessee Plan as it relates to the election of justices of the state supreme court. *Johnson, 356 F. App'x at 781-82*. There, we held that plaintiffs who were similarly situated to Moncier lacked standing to bring claims under the *Fourteenth Amendment to the United States Constitution*. *Id. at 783-84*. Relying on Supreme Court precedent, we determined that the plaintiffs could not "challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens." *Id. at 784* (quoting *Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 598, 127 S. Ct. 2553, 168 L. Ed. 2d 424 (2007)*). We explained that "the judicial power of the United States defined by Art[icle] III is not an unconditional authority to determine the constitutionality of legislative or executive acts." *Id.* (brackets, citation, and internal quotation marks **[**12]** omitted). Because the plaintiffs merely alleged that, in carrying out the Tennessee Plan, state officials were not complying with the *Fourteenth Amendment*, the plaintiffs "failed to assert a particularized stake in the litigation" and

therefore lacked standing. *Id.* (internal quotation marks omitted).

Moncier's challenge to the Tennessee Plan suffers from many of the same shortcomings. Rather than asserting a "particularized stake in the litigation," Moncier's complaint contained mostly general allegations that the manner in which Tennessee selects and retains its appellate-court judges violates his rights *and the rights of all Tennessee voters* under the First and Fourteenth Amendments. His complaint repeatedly maintained that "the people of Tennessee" have been or will be deprived of their right to vote for the office of Judge of the Tennessee Court of Criminal Appeals in the August 2014 general election and that he seeks relief on their behalf. *Moncier, 2014 U.S. Dist. LEXIS 26434, 2014 WL 806418, at *5*. Moreover, as the district court determined, at a hearing on Moncier's various motions to amend his filings, "[Moncier] claimed he was injured because he wanted to run for office, [and] *he emphasized that he was* ***[**13]*** *pursuing this litigation on behalf of the people of Tennessee to make a point about the manner in which appellate court judges are selected and retained." Id.* (emphasis added).

This is precisely the type of generalized grievance courts have found ill-suited for **[*558]** judicial resolution. *See, e.g., Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220-21, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974)* ("[S]tanding to sue may not be predicated upon an interest . . . which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share."). In *Lance v. Coffman, 549 U.S. 437, 127 S. Ct. 1194, 167 L. Ed. 2d 29 (2007)* (per curiam), the Supreme Court affirmed the dismissal of a challenge to Colorado's 2003 redistricting plan brought by four private citizens because "[t]he only injury plaintiffs allege is that the law—specifically the *Elections Clause [U.S. Const. art. I, § 4, cl. 1]*—has not been followed." *Id. at 442*. The Court went on to state that the asserted injury "is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *Id.* (distinguishing the *Lance* plaintiffs from other voting-rights plaintiffs and cases **[**14]** where the Court found standing).

Moncier makes no effort to distinguish his claims under the *First* and *Fourteenth Amendments* (which rely heavily on *Anderson v. Celebrezze, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983)*, and *Burdick v. Takushi, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992))* from *Hein, Schelesinger, Lance*, or any number of other Supreme Court cases that denied standing where a plaintiff asserted "a general interest common to all members of the public" in the conduct of their government. *Lance, 549 U.S. at 440* (quoting *Ex parte Levitt, 302 U.S. 633, 634, 58 S. Ct. 1, 82 L. Ed. 493 (1937)* (per curiam)). The crux of Moncier's complaint is that Tennessee voters cannot, in all instances, elect the judges of the state's appellate courts. This injury is "plainly undifferentiated and common to all members of the public." *Id. at 440-41* (internal quotation marks omitted); *Johnson, 356 F. App'x at 784*.

Moncier presents a closer call on the issue of standing to the extent that he alleges he was denied the opportunity to appear on the August 2014 ballot. Here, his purported injury differs slightly from the plaintiffs who challenged the Tennessee Plan in *Johnson v. Bredesen.* One of the *Johnson* plaintiffs, John Jay Hooker, initially argued that the Tennessee Plan **[**15]** violated his constitutional rights because it denied him an opportunity to be a candidate for the Supreme Court of Tennessee. *356 F. App'x at 782*. The district court nevertheless found that Hooker lacked standing because he made "no

contention of unequal treatment as a potential candidate pursuant to the equal protection clause" and because our court already held that Hooker "ha[d] no property right to run for a state office." Johnson v. Bredesen, Nos. 3:07-0372, 3:07-0373, 2008 U.S. Dist. LEXIS 19738, 2008 WL 701584, at *5 (M.D. Tenn. Mar. 13, 2008) (citing Hooker v. Anderson, 12 F. App'x 323, 324 (6th Cir. 2001) (affirming the district court's dismissal of Hooker's suit and noting that he had no property right to be a candidate)). Nevertheless, Hooker did not appeal that portion of the district court order, so we had no cause to determine whether he had standing to challenge the Tennessee Plan based on his own desire to run for office. Johnson, 356 F. App'x at 782.

Here, the district court "recognized [Moncier's] injury in that he was denied the opportunity to be placed on the August 2014 ballot" but found that, "on the basis of his allegations and arguments," Moncier had yet again presented "a generalized grievance **[**16]** shared by a large class of citizens." Moncier, 2014 U.S. Dist. LEXIS 26434, 2014 WL 806418, at *5 ("Undoubtedly, any Tennessean who desires to run for the office of an appellate judge would encounter the **[*559]** exact same obstacles that plaintiff has asserted here."). There is some purchase to the district court's rationale, though Moncier points out that his harm is somewhat unique in that (1) only a licensed attorney can qualify for one of the state's appellate judgeships; (2) only a resident from the Eastern Grand Division can qualify for the particular judgeship Moncier seeks; and (3) unlike other qualified voters, Moncier took *some* steps to seek this judgeship (though he failed to apply to the JNC).

Ultimately, we need not weigh-in on this portion of the district court's opinion because there is no federally protected interest in seeking a state-court judgeship that, under state law (as interpreted by the state supreme court), already has been lawfully filled by gubernatorial appointment. *See* Snowden v. Hughes, 321 U.S. 1, 7, 64 S. Ct. 397, 88 L. Ed. 497 (1944) ("The right to become a candidate for state office . . . is a right or privilege of state citizenship . . . ."); Newman v. Voinovich, 986 F.2d 159, 161, 163 (6th Cir. 1993) (affirming **[**17]** dismissal under Rule 12(b)(6) of a suit challenging Ohio's judicial-appointment procedures under the First and Fourteenth Amendments); Burks v. Perk, 470 F.2d 163, 165 (6th Cir. 1972) ("Public office is not property within the meaning of the Fourteenth Amendment."); *see also* Wilson v. Birnberg, 667 F.3d 591, 598 (5th Cir. 2012) ("[T]here is no constitutional right to run for state office protected by the Fourteenth Amendment." (citation and internal quotation marks omitted)); Velez v. Levy, 401 F.3d 75, 86-87 (2d Cir. 2005) ("[Plaintiff] lacks a constitutionally cognizable property interest in her employment as an elected official.").

Because Moncier has no federally protected interest in appearing on the ballot as a candidate for state-court judge, dismissal would have been equally appropriate under Federal Rule of Civil Procedure 12(b)(6). Newman, 986 F.2d at 163. We note that the defendants twice requested dismissal on this ground below.

Moncier cites *Anderson v. Celebrezze* and *Burdick v. Takushi*, but those cases offer no refuge. *Anderson* and *Burdick* established "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters . . . **[**18]** to cast their votes effectively." *See* Miyazawa v. City of Cincinnati, 45 F.3d 126, 127 (6th Cir. 1995) (quoting Anderson, 460 U.S. at 787)). Together, they created a balancing test, commonly referred to as "the *Anderson-Burdick* standard," for courts to apply when reviewing constitutional challenges to state election laws. *See* Obama for Am. v. Husted,

697 F.3d 423, 428-30 (6th Cir. 2012).

But both *Anderson* and *Burdick* presupposed that state law required an election for a particular office in the first place. Anderson, 460 U.S. at 782 (reviewing Ohio's process for presidential candidates to qualify for the general-election ballot); Burdick, 504 U.S. at 430 (reviewing Hawaii's write-in balloting system for electing members of the state legislature). Neither case mandated that states organize their governments in a particular manner or provide for the election of state-court judges. Nor did either case stipulate when states may deem a particular office vacant or specify how states must fill those vacancies. Accordingly, *Anderson* and *Burdick* bear little weight on Moncier's challenge to the Tennessee Plan, which provides that Judge Tipton's seat on the court of criminal appeals will remain **[**19]** occupied by gubernatorial appointment until 2016. Ultimately, Moncier's reliance on *Anderson* and *Burdick* falls short because he has no recognized right under the United States Constitution to run for an office that, under state law, already has been filled.

[*560] Moncier also asserts that the district court erred in dismissing his complaint because he pleaded an additional twenty causes of action, including several causes of action under the Tennessee Constitution and state statutory *quo warranto* procedures, all of which provided him with the requisite standing or claim for relief. Moncier pleaded these additional causes of action, however, in his proposed amended complaint, which the district court declined to allow him to file. Moncier, 2014 U.S. Dist. LEXIS 26434, 2014 WL 806418, at *8. Moncier did not notice an appeal of that denial, nor has he alleged in his briefing with this court that the district court abused its discretion by denying his various motions to amend his pleadings. Consequently, the issue of whether Moncier has standing or a plausible claim for relief under the additional causes of action he asserted is not properly before this court. *See* United States v. Johnson, 440 F.3d 832, 845-46 (6th Cir. 2006) **[**20]** ("An appellant abandons all issues not raised and argued in its initial brief on appeal." (brackets and internal quotation marks omitted)). Because Moncier asserted no cognizable legal right under the United States Constitution, his state claims are best left to the state courts.

III. CONCLUSION

We affirm the dismissal of Moncier's Section 1983 action and the denial of his request for preliminary injunctive relief. We decline to consider Moncier's remaining filings with this court, including an application for a temporary injunction on appeal and two motions to take judicial notice of news accounts and newly discovered events in Tennessee, because our dismissal renders them moot.

End of Document