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.

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

BRIEF OF DEFENDANT-APPELLEE COUNT MI VOTE d/b/a VOTERS NOT POLITICIANS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for Defendant-Appellee COUNT MI VOTE d/b/a Voters Not Politicians certifies 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 its outcome.

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STATEMENT REGARDING ORAL ARGUMENT

The outcome of this appeal is controlled by this Court's prior decision in this case, *Daunt v. Benson*, 956 F.3d 396 (6th Cir. 2020), and thus Defendant-Appellee COUNT MI VOTE d/b/a Voters Not Politicians ("VNP") does not believe oral argument is necessary. If the Court decides to hear argument, VNP wishes to participate.

STATEMENT OF ISSUES

1. Whether this Court's prior panel decision holding that the Michigan Independent Citizen's Redistricting Commission's ("Commission") eligibility criteria are constitutional binds this Court and requires affirmance of the district court's dismissal of Appellants' complaint.

2. Whether, as this Court and the district court have held, the Commission's eligibility criteria satisfy the First Amendment to the U.S. Constitution under any applicable legal framework.

3. Whether, as this Court has held, Michigan's decision to exclude conflicted commissioners was rational, and thus does not violate the Fourteenth Amendment.

4. Whether the voters of Michigan intended that the amendment's provisions be severable given that they approved a clause requiring that any invalidated provision be severed and the remainder continue in effect.

STATEMENT OF THE CASE

Fifteen individuals challenge the constitutionality of the Michigan Independent Citizen's Redistricting Commission ("Commission"), which has the exclusive authority to establish redistricting plans for Michigan's state legislative and congressional districts. Opinion, RE.67, PageID#929. Appellants contend that the Commission's structure and eligibility requirements, which preclude them from

currently serving as commissioners, violate their rights of freedom of speech and equal protection under the First and Fourteenth Amendments.

The Commission was established by constitutional amendment. On December 18, 2017, Defendant-Appellee Voters Not Politicians ("VNP"), the sponsor of the amendment, filed an initiative petition with the Secretary of State that proposed establishing a permanent commission in the legislative branch to redistrict every ten years following the census. Mich. Const. art. IV, § 6(1); Opinion, RE.67, PageID#929. On June 20, 2018, after VNP gathered over 425,000 signatures, the proposal was certified by the Board of State Canvassers and added to the November 6, 2018 general election ballot as Ballot Proposal 18-2. Opinion, RE.67, PageID#929; VNP Motion to Intervene Brief, RE.12, PageID#175. VNP submitted the proposed amendment "to remedy the widely-perceived abuses associated with partisan 'gerrymandering' of state legislative and congressional election districts by the establishment of new constitutionally mandated procedures designed to ensure that the redistricting process can no longer be dominated by one political party." *Citizens Protecting Michigan's Constitution v. Sec'y of State*, 922 N.W.2d 404, 410 (Mich. Ct. App. 2018), *aff'd*, 921 N.W.2d 247 (Mich. 2018).

Ballot Proposal 18-2 stated the following:

Statewide Ballot Proposal 18-2

> A proposed constitutional amendment to establish a commission of citizens with exclusive authority to adopt district boundaries for the

Michigan Senate, Michigan House of Representatives and U.S. Congress, every 10 years.

This proposed constitutional amendment would:

Create a commission of 13 registered voters randomly selected by the Secretary of State:

- 4 each who self-identify as affiliated with the 2 major political parties; and

- 5 who self-identify as unaffiliated with major political parties.

- Prohibit partisan officeholders and candidates, their employees, certain relatives, and lobbyists from serving as commissioners.
- Establish new redistricting criteria including geographically compact and contiguous districts of equal population, reflecting Michigan's diverse population and communities of interest. Districts shall not provide disproportionate advantage to political parties or candidates.
- Require an appropriation of funds for commission operations and commissioner compensation.

Should this proposal be adopted?

[ ] YES [ ] NO

Opinion, RE.67, PageID#929-930.

Over 2.5 million citizens, 61% of voters, approved Proposal 18-2 in the November 2018 general election. *Id*.; VNP Motion to Intervene Brief, RE.12, PageID#174. The amendment took effect on December 22, 2018. Mich. Const. art. XII, § 2. The Commission consists of thirteen commissioners, each of whom is a state officer. Opinion, RE.67, PageID#951. To qualify, one must be a registered, eligible Michigan voter and must not currently be, or have in the past six years been:

(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;

Mich. Const. art. IV, § 6(1). In addition, one must not be a "parent, stepparent, child, stepchild, or spouse" of any of the above persons, and must not otherwise be disqualified from holding appointed or elected office. *Id.* Commissioners may not "hold a partisan elective office at the state, county, city, village, or township level in Michigan" for five years after they are appointed. *Id.*

Defendant-Appellee Benson, Michigan's Secretary of State, is responsible for overseeing the commissioner selection process. Mich. Const. art. IV, § 6(2). The amendment established a robust process to ensure a representative set of commissioners. The Secretary is required to mail applications to ten thousand Michigan voters chosen at random. *Id.* § 6(2)(a)(i). After the application period has

closed, the Secretary must randomly select 60 applicants affiliated with each of the two major parties, and 80 unaffiliated applicants, with half of each pool originating from applicants who were mailed applications at random, and half from those who applied on their own accord. *Id.* § 6(2)(d)(ii). The four leaders of the legislature then each have the opportunity to strike up to five applicants from any pool. *Id.* § 6(2)(e). Finally, the Secretary must randomly draw four applicants from each of the two major party pools, and five from the unaffiliated pool. *Id.* § 6(2)(f). Those thirteen will be the commissioners.

In the summer and fall of 2020, thirteen commissioners were selected according to the process outlined above. *See Independent Citizens Redistricting Commission*, Office of Sec'y of State Jocelyn Benson, https://www.michigan.gov/sos/0,4670,7-127-1633_91141---,00.html (last visited Dec. 2, 2020). The Commission has started its work, including holding its first meeting on September 17, 2020, adopting internal procedural rules, planning and budgeting for 2021, and hiring staff. *See Independent Citizens Redistricting Commission Meetings Archive*, Office of Sec'y of State Jocelyn Benson, https://www.michigan.gov/sos/0,4670,7-127-1633_91141-540204--,00.html (last visited Dec. 2, 2020).

Secretary Benson is a non-voting member of the Commission. Mich. Const. art. IV, § 6(4). The affirmative votes of at least seven members of the Commission,

including a minimum of two self-identified Republican affiliates, two self-identified Democratic affiliates, and two members self-identified as unaffiliated with either major party, are required to pass a redistricting plan. *Id.* § 6(14)(c).

On July 30, 2019 and August 22, 2019, respectively, the *Daunt* and *Michigan Republican Party* ("MRP") Plaintiffs filed suit, alleging that the Commission's structure and eligibility requirements violate their First and Fourteenth Amendment rights, and requesting a preliminary injunction to prevent Secretary Benson from implementing or administering the Commission. Opinion, RE.67, PageID#936-941. On August 28 and September 6, 2019, the district court granted VNP's motion to intervene as a Defendant in the two cases. Order, RE.23, PageID#262; Order, RE.15 (MRP), PageID#171. The cases were then consolidated.

On November 25, 2019, the district court denied Plaintiffs' motions for a preliminary injunction, concluding that they were unlikely to succeed on the merits and that the remaining preliminary injunction factors were not satisfied. Opinion, RE.67, PageID#926-971. Both sets of Plaintiffs appealed that decision to this Court, with oral argument heard on March 17, 2020.

On April 15, 2020, this Court affirmed the district court's denial of preliminary relief to Plaintiffs. *See Daunt v. Benson*, 956 F.3d 396 (6th Cir. 2020) ("*Daunt I")*. This Court unanimously concluded that Plaintiffs' claims failed under any legal standard. *Id.* at 406, 422-31. The majority assessed Plaintiffs' claims

regarding the eligibility criteria under both the *Anderson-Burdick*[1] test and the unconstitutional-conditions doctrine, concluding that it "need not choose between the two" because "the eligibility criteria are constitutional under either." *Id.* at 406 (citing *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 920 (6th Cir. 1998)).

Starting with *Anderson-Burdick*, this Court noted that "at bottom, the *Anderson-Burdick* framework is used for evaluating 'state election law[s],' and a law restricting membership of the body that draws electoral lines could conceivably be classified as an 'election law.'" *Id.* at 407 (citing *Burdick*, 504 U.S. at 434). Applying the test, this Court found that any burden on Plaintiffs was not severe, as the content-neutral criteria "do not burden plaintiffs[] based on their status as Republicans," or "on their views on any of the substantive 'issues of the day,"' there is no "'historical bias' against them as individuals with potential conflicts of interest," they can still run for nonpartisan office, vote, and distribute campaign literature, and because "the temporal limitation of the law in this case belies any suggestion that the burden is severe." *Id.* at 408. Instead, the Court held that the burden on the Plaintiffs "is relatively insignificant, given (1) their ability to serve on the Commission after their six-year period of ineligibility expires, (2) the lack of any

[1] *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

direct prohibition or regulation of pure speech, and (3) the absence of any fundamental right to be a member of the Commission." *Id.* at 409 (citations omitted).

In contrast, this Court found that "Michigan has a compelling interest 'in limiting the conflict of interest implicit in legislative control over redistricting,'" and "'[a]s a sovereign polity, Michigan has a fundamental interest in structuring its government.'" *Id.* (citations omitted). Weighing the insignificant burden on the Plaintiffs with the State's compelling interests, the panel concluded that "the challenged provisions of the Amendment directly advance [the State's] interests" and thus "the district court did not abuse its discretion in concluding that the plaintiffs[] are unlikely to succeed on their First and Fourteenth Amendment claims against the eligibility criteria under the *Anderson-Burdick* test." *Id*.

Turning next to the unconstitutional-conditions doctrine, the Court noted that although "some of the activities restricted by the eligibility criteria are protected by the First Amendment," the "Supreme Court has repeatedly held that these types of restrictions do not run afoul of the First Amendment or the Equal Protection Clause" due to the "government's interest in avoiding partisan conflicts of interest and unsavory patronage practices." *Id*. at 410-11 (citing *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75 (1947); *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *Clements v. Fashing*, 457 U.S. 957 (1982)). The Court held that "*Mitchell*, *Letter Carriers*, and *Clements* squarely foreclose the

present challenge to the Amendment's eligibility criteria," *Id*. at 411, as "Michigan's interest in addressing the *appearance* of undue influence—whether or not members of the Commission are 'actively partisan'—permits it to disqualify not just only active partisans but also those who[] . . . could create the appearance that the Commission is staffed by political insiders." *Id.* (citations omitted). The Court was "loath to disturb" the "longstanding practice" of "[e]fforts to purge conflicts of interest from the democratic process," "particularly when 'public confidence in the integrity of the redistricting process' is at stake." *Id.* (citations omitted).

This Court further noted that "decisions of our sister circuits demonstrate that even when laws establish eligibility criteria for elected officeholders, thus burdening not only the candidates themselves but voters who may have otherwise sought to elect them, courts have applied a less-than-exacting standard of review." *Id*. at 412 (citing *Grizzle v. Kemp*, 634 F.3d 1314 (11th Cir. 2011) (applying rational-basis review to eligibility criteria for public office); *Fletcher v. Marino*, 882 F.2d 605 (2d Cir. 1989) (same)). The Court concluded that "the laws in these cases involved elected positions, whereas the Amendment does not," making "the argument for rational-basis review even stronger here, given that the eligibility criteria do not burden any voter's access to the ballot." *Id.* at 412. The Court thus found the criteria constitutional under rational-basis review. *Id.* Finally, the Court found that the eligibility criteria's conformity with the Supreme Court's government funding and

political patronage precedents further supported "the conclusion that the eligibility criteria do not impose an unconstitutional condition on the plaintiffs[]." *Id.* at 413.

Concurring in the judgment, Judge Readler wrote that "the majority opinion appropriately pays deference to a sovereign state's decision as to self-governance." *Id.* at 422. Judge Readler disagreed with the application of *Anderson-Burdick* to this case, *id.*, but he would have upheld the eligibility criteria under a more deferential test, the "deferential approach" identified in *Miller*, because in his view, it "affords appropriate deference to a state's strong interest in self-governance." *Id.* at 426. In addition, he took no issue with the majority's decision to uphold the criteria under the unconstitutional-conditions doctrine, reiterating the long history of conflicts-of-interest laws and limitations on public office holders. *Id.* at 422-431.

Finally, this Court unanimously agreed that *MRP*'s freedom of association, speech, and viewpoint discrimination claims had no merit. *Id.* at 414-422.

Following this Court's decision, Appellants petitioned for rehearing *en banc*. On June 19, 2020, this Court denied the petitions, with no judge requesting a vote. *See Daunt v. Benson*, No. 19-2377, RE.83-1 (6th Cir.). This Court's mandate was issued on June 29. Mandate, RE.74. On July 6, the district court granted Defendants' pending motions to dismiss. Sec'y Benson Motions to Dismiss, RE.42 (Daunt), RE.48 (MRP); VNP Motions to Dismiss, RE.33 (Daunt), RE.37 (MRP).

In dismissing the Plaintiffs' claims, the district court assessed whether the complaints presented "'enough facts to state a claim to relief that is plausible on its face,'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547, 570 (2007), viewing "the complaint in the light most favorable to the plaintiff, accepting as true all well-pled factual allegations and drawing all reasonable inferences in favor of the plaintiff." Opinion, RE.75, PageID#1052-53. The court further stated that "'[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*., RE.75, PageID#1053 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

In light of the prior proceedings in this case, the Court noted that although the standard for assessing a preliminary injunction differs from that under Rule 12, "'[w]hen the appellate panel considering the preliminary injunction has issued "[a] fully considered appellate ruling on an issue of law," then that opinion becomes the law of the case.'" *Id.*, RE.75, PageID#1054 (citing *Howe v. City of Akron*, 801 F.3d 718, 740 (6th Cir. 2016) (collecting cases from other circuits reaching the same conclusion)). The Court concluded that since "the Sixth Circuit issued a fully considered appellate decision on the legal issues in this case," the decision "should be given effect in this stage of the litigation." *Id.*, RE.75, PageID#1055.

Considering both the Daunt Plaintiffs' First and Fourteenth Amendment claims as well as the MRP Plaintiffs' freedom of association, freedom of speech, and equal protection claims, the Court examined the Sixth Circuit's ruling in detail and held that since "the parties' motion-to-dismiss papers either wholly incorporate or substantially repeat their preliminary injunction arguments," and "neither the parties' arguments nor the record has changed in the interim," "this Court finds persuasive, if not binding, the Sixth Circuit's decision that the eligibility criteria are constitutional" and thus that Plaintiffs "failed to state plausible claims for relief under the First and Fourteenth Amendments and [] dismissal of this case is warranted." *Id.*, RE.75, PageID#1055-1059, 1059-1068.

The district court issued its judgment on July 6, 2020, Judgment, RE.76, and the Daunt Plaintiffs alone filed a notice of appeal to this Court on August 3, 2020. Notice of Appeal, RE.77.

SUMMARY OF ARGUMENT

This Court has already held that Appellants' claims fail as a matter of law. Neither Appellants' claims nor the law has since changed. The district court's order dismissing those claims should be affirmed.

First, this Court's decision upholding the Commission's eligibility criteria as constitutional in *Daunt I* is binding on this Court and compels affirmance of the district court's dismissal order. Panels of this Court, and district courts within this

Circuit, are bound by prior Sixth Circuit panel decisions. Appellants' contention that the district court, and this Court, are free to disregard *Daunt I* because it involved review of the denial of preliminary injunction is wrong. Under this Court's precedent, the fully considered legal conclusions of a prior panel are binding, including as law of the case, even when those legal conclusions are made in the preliminary injunction context. This Court's decision in *Daunt I* followed full merits briefing and oral argument. The decision included lengthy and substantial legal reasoning. The district court was bound to apply *Daunt I's* interpretation of the law, and so is this Court. *Daunt I* required the dismissal of Appellants' claims, and requires this Court to affirm that dismissal.

Second, Appellants' First Amendment arguments are no more convincing now than they were before. Appellants' chief objection is to application of the *Anderson-Burdick* test. But as this Court held, Appellants' claims fail under any potentially relevant standard because Michigan's sovereign right to determine the qualifications for its government officials must be afforded substantial weight. That deference, balanced against the limited burden on Appellants' First Amendment rights, compels rejection of their claims, and is consistent with Supreme Court precedent upholding similar limitations and conflict-of-interest laws. Appellants' contention that heightened scrutiny should apply to the Commission's eligibility criteria has no basis in law, and is contrary to the precedent they cite.

Third, Appellants' Equal Protection claim was likewise properly dismissed by the district court because it largely repackages their failed First Amendment claim. The Commission's eligibility criteria are not premised upon any suspect classification, and Michigan's choices easily pass rational basis review.

Fourth, the Court need not reach Appellants' contention that the eligibility criteria are not severable, because there is nothing unlawful to sever. But if there were, Appellants' contention—ironic for people who claim they wish to serve on the Commission—is without merit. The Amendment contains an express severability clause, the law favors severability even absent such a clause, and Appellants offer no evidence that Michigan's voters would have preferred the status quo—guaranteeing that redistricting would remain in partisan hands—over the mere chance that a partisan official could have her name drawn to serve on the Commission.

The district court's order dismissing the complaint should be affirmed.

STANDARD OF REVIEW

The Court "review[s] de novo the district court's dismissal for failure to state a claim upon which relief can be granted." *Cline v. Rogers*, 87 F.3d 176, 179 (6th Cir. 1996).

ARGUMENT

I. This Court's *Daunt I* Decision Requires Affirmance of the District Court's Dismissal Order.

This Court's prior panel decision holding that the Commission's "eligibility criteria are constitutional," *Daunt I*, 956 F.3d at 406, compels affirmance of the district court's dismissal of Appellants' complaint. "A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *United States v. Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996) (quotation marks omitted); *see also* 6th Cir. R. 32.1 ("Published panel opinions are binding on later panels. A published opinion is overruled only by the court en banc."). This rule holds true for prior panel decisions regarding the grant or denial of preliminary injunctions. Moreover, where the subsequent appeal is in the same case as the prior panel decision, the law-of-the-case doctrine applies. "[W]hen the appellate panel considering the preliminary injunction has issued '[a] fully considered appellate ruling on an issue of law,'" then "the conclusions with respect to the likelihood of success on the merits are the law of the case in any subsequent appeal." *Howe v. City of Akron*, 801 F.3d 718, 740 (6th Cir. 2015) (quoting 18B Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper*, Fed. Practice & Procedure: Jurisdiction & Related Matters* § 4478.5 (4th ed. 2015)). This is especially so when the first panel

has the benefit of "full briefing and argument without unusual time constraints." *Id.* (quotation marks omitted).

This rule compels the conclusion that the Commission's "eligibility criteria are constitutional," *Daunt I*, 956 F.3d at 406, and requires this Court to affirm the district court's dismissal of Appellants' complaint. The *Daunt I* decision did not turn on any factual determinations, nor do Appellants raise any factual issues in their current appeal. Indeed, Appellants have long disclaimed that their suit requires any factual determinations. RE.4, PageID#70 (asserting that "[t]here are no contested facts here" and requesting that preliminary injunction and hearing on the merits be consolidated pursuant to Fed. R. Civ. P. 65(a)(2)). Rather, Appellants' claims turn entirely on legal issues—legal issues that were fully briefed and considered by this Court. The prior panel had the benefit of a lengthy opinion by the district court, full briefing by the parties without any undue time pressure, and oral argument by the parties. The Court's opinion included thirty-one pages of legal analysis, with thirteen additional pages of legal analysis by Judge Readler in his concurrence. It was precisely the type of "fully considered ruling on an issue of law" that must be accorded binding effect. *Howe*, 801 F.3d at 740.

Appellants contend that neither the district court nor this Court are bound by *Daunt I* because "the panel's determination . . . at the interlocutory appeal stage essentially amount to dicta at the merits stage." Br. at 15-16. This is so, Appellants

say, because "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," and thus the district court on remand "should have analyzed Appellants' claims under the more lenient motion to dismiss standard." *Id.* at 16. Appellants' argument is without merit.

First, Appellants' contention that *Daunt I* is "dicta" is incorrect. *Daunt I* held as a legal matter that the Commission's eligibility qualifications did not violate the First or Fourteenth Amendments. *See Daunt I*, 956 F.3d at 406-13. That ruling, and all aspects of the analysis necessary to it, were this Court's *holding*. Appellants are mistaken in asserting that a published opinion of this Court can be entirely "dicta" merely because it pertained to a requested preliminary injunction.

Second, Appellants object that to survive a motion to dismiss they needed only to "present enough facts to state a claim to relief that is plausible on its face," Br. at 13 (internal quotation marks omitted), and that the "[p]roof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a [motion to dismiss]," *id.* at 16 (quoting *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (first bracket in original)). True enough. But their complaint was not dismissed for failure to allege sufficient *facts*, but rather because the facts alleged did not state a legal claim. *See* Fed. R. Civ. P. 12(b)(6). That result was compelled by *Daunt I*'s holding, as a legal matter, that the Commission's

eligibility requirements do not violate the First or Fourteenth Amendments. *See Daunt I*, 956 F.3d at 406. The law is the law—it does not change from the preliminary injunction context to the dismissal context. Appellants are not entitled, in defending against a motion to dismiss, to a more favorable legal interpretation merely so the correct legal interpretation can *later* doom their claims.

Nor is it relevant that "[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." Br. at 16 (quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). While a district court is not bound by *its own* earlier factual findings or legal conclusions, a district court—and a subsequent appellate panel—*are* bound by the legal conclusions of an earlier appellate panel, regardless of whether that appellate review was in the context of a requested preliminary injunction. *See Howe*, 801 F.3d at 740.

The district court was not, as Appellants suggest, free to disregard *Daunt I*'s holding and, on remand, conduct is its own contrary "independent analysis" of whether the Commission's eligibility requirements violated the Constitution. Br. at 16. *Daunt I* said what the law was: "the eligibility criteria are constitutional." 956 F.3d at 406. *Daunt I* requires affirmance of the district court's order dismissing Appellants' complaint.[2]

[2] This Court can and should end its analysis there. VNP nevertheless responds to Appellants' arguments—which are nearly exactly duplicative of their arguments in the prior appeal—to ensure its arguments are preserved.

II. The Commission's Eligibility Requirements Do Not Violate the First Amendment.

The Commission's eligibility requirements do not violate the First Amendment. As this Court acknowledged in *Daunt I*, this case presents issues of first impression in federal court, and thus there is no settled "test" fit for this case. *Daunt I*, 956 F.3d at 406. But under any rubric, Michigan's overriding sovereign interest in structuring its government is the most important consideration—one that tilts the scales in favor of the constitutionality of the Commission's eligibility requirements. As the Supreme Court has explained, "each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (quotation marks omitted). This "power inheres in the State by virtue of its obligation . . . to preserve the basic conception of a political community," and applies to the State's power to set qualifications for "important nonelective . . . positions." *Id.* (quotation marks omitted).

In *Citizens for Legislative Choice v. Miller*, this Court rejected a challenge to Michigan's legislative term limits. The Court explained that, "[a]s a sovereign, Michigan deserves deference in structuring its government." 144 F.3d 916, 925 (6th Cir. 1998). That is so because "the authority of the people of the States to determine the qualifications of their most important government officials . . . is a power reserved to the States under the Tenth Amendment and guaranteed them by [the

Guarantee Clause] of the Constitution." *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991)) (quotation marks omitted). Michigan's power to determine its governmental structure is its most fundamental right. "Through the structure of its government, and the character of those who exercise governmental authority, a State defines itself as a sovereign." *Id.*; *see also* The Federalist No. 43, at 292 (J. Madison) (Jacob Cooke ed., 1961) ("Whenever the states may chuse to substitute other republican forms, they have a right to do so . . . .").

Appellants thus face a high bar in seeking to invalidate Michigan's sovereign decision to set qualifications for service as commissioner on its independent redistricting commission. "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900)). As this Court held in *Daunt I*, Michigan's eligibility requirements easily satisfy the Constitution, regardless of what framework is used to assess them.

A. The Commission's Eligibility Requirements Are Constitutional Under Either the *Anderson-Burdick* Test or the Unconstitutional Conditions Doctrine.

The Commission's eligibility requirements do not violate the First Amendment under any conceivable framework of analysis. In *Daunt I*, this Court

considered Appellants' claims under two frameworks—the *Anderson-Burdick* test and the unconstitutional conditions doctrine—and concluded that it "need not choose between the two" because "the eligibility criteria are constitutional under either." 956 F.3d at 406 (quoting *Miller*, 144 F.3d at 920).

First, this Court rejected Appellants' claims under the *Anderson-Burdick* test. Analogizing the selection of commissioners tasked with drawing the district lines that govern elections to an election law, this Court noted that rationales underlying the *Anderson-Burdick* test—"ensuring that 'the democratic processes' are 'fair and honest,' and 'maintain[ing] the integrity of the democratic system,'—resonate here, too." *Id.* at 407 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974), and *Burdick*, 504 U.S. at 441).

Starting with the magnitude of the burden posed on Appellants, this Court concluded that it was not severe, citing its decision in *Miller* upholding a lifetime-term-limit law, which likewise did not burden anyone on the basis of protected characteristics or viewpoint. *Id.* at 407-08. Here, Republicans are not burdened based upon their partisan affiliation or their views, and there is no "'historical bias' against them in their capacity as individuals with potential conflicts of interest" related to redistricting. *Id.* at 408 (quoting *Miller*, 144 F.3d at 922). Moreover, there are

alternative paths to service available here, because the prohibition is temporally limited to six years. *Id.*

This Court noted that the burden may be viewed as more than minimal, given that some of the eligibility criteria correspond with First Amendment activities, although "the Supreme Court has deemed similar restrictions on political expression to be minimal," *id.*, such as waiting-periods on engaging in political activities, *see Clements v. Fashing*, 457 U.S. 957, 967 (1982) (upholding two-year waiting period as "*de minimis*" burden), and a prohibition on political activities for federal employees, *see U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 550, 556 (1973).

This Court concluded that even if labeled a moderate burden, the Commission's eligibility requirements "easily satisfy" the *Anderson-Burdick* test because the burden they impose is "relatively insignificant" considering their temporal limitation, the lack of a direct speech prohibition, and the absence of a fundamental right to serve as a Commissioner. *Daunt I*, 956 F.3d at 408-09. By contrast, this Court concluded that "Michigan has a compelling interest 'in limiting the conflict of interest implicit in legislative control over redistricting,' and 'as a sovereign polity, . . . a fundamental interest in structuring its government.'" *Id.* at 409 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2676 (2015), and *Miller*, 144 F.3d at 923). Because the Commission's

eligibility requirements "directly advance both of these interests," *id.*, this Court concluded that they satisfy scrutiny under the *Anderson-Burdick* test.

This Court likewise concluded that the eligibility requirements are constitutional when assessed under the unconstitutional conditions doctrine, which applies where the government seeks to "accomplish[] indirectly" that which "the First Amendment precludes [it] from commanding directly." *Id.* at 410 (quoting *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77-78 (1990)). This is so because the Supreme Court has repeatedly held that restrictions like the Commission's eligibility requirements "do not run afoul of the First Amendment or the Equal Protection Clause." *Id*. This Court cited two Supreme Court cases upholding the Hatch Act's prohibitions on political activity by federal employees. First, in *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75 (1947), the Supreme Court upheld that ban on executive branch officials taking active part in political campaigns, reasoning that the government's interest in "efficient public service" might be best served by precluding political campaigning by its employees, and that it did not violate the First Amendment to prohibit campaign involvement during or outside of work hours. *Id.* at 95. Second, in *United States Civil Service Commission*, 413 U.S. 548, the Court again upheld the Hatch Act, and was "unequivocal in approving of Congress's power to cleanse the civil service of partisan conflicts of interest," *Daunt I*, 956 F.3d at 410. "The [Supreme] Court explained that 'the

judgment of Congress, the Executive, and the country appears to have been that partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences.'" *Id.* at 410-11 (quoting *U.S. Civil Serv. Comm'n*, 413 U.S. at 564).

This Court also pointed to the Supreme Court's decision in *Clements*, in which it upheld a Texas law prohibiting those elected to the legislature from holding another office simultaneously. *Id.* at 411. In *Clements*, the Court held that this burden was "so insignificant" that it posed no First Amendment or Equal Protection problem. 457 U.S. at 972.

This Court held that this line of Supreme Court cases "squarely foreclose the present challenge to the Amendment's eligibility criteria." *Daunt I*, 956 F.3d at 411. Just as federal and state governments may restrict their officials from engaging in partisan political activities, this Court "discern[ed] no constitutional limitation on Michigan making the forbearance from such activity a condition of sitting on an independent redistricting commission." *Id*. Likewise, because Michigan has an equally strong interest in preventing the "*appearance* of undue influence," *id.* (emphasis in original), it is permissible to extend the restrictions beyond those currently serving in partisan roles through its six year waiting period. *Id*. This Court

noted that its conclusion was consistent with the approach of other circuits approving limitations on political activities of public officials and their families, *see Grizzle v. Kemp*, 634 F.3d 1314 (11th Cir. 2011), and with the rationale underlying the Supreme Court's cases prohibiting patronage employment practices, *see, e.g.*, *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990).[3]

Appellants point to no new facts, and no intervening case law, that would warrant a different outcome now.

B. The Commission's Eligibility Requirements Are Consistent with Supreme Court Precedent Upholding Conflict-of-Interest Laws Against First Amendment Challenge.

As Judge Readler explained, *id.* at 427-28 (Readler, J., concurring in judgment), the Supreme Court has previously upheld a similar conflict-of-interest law against a First Amendment challenge. In *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117 (2011), the Supreme Court rejected a First Amendment

[3] Appellants heavily relied upon the Supreme Court's patronage line of cases early in the litigation, but have since abandoned that focus. Undoubtedly this is because the Supreme Court has repeatedly held that the First Amendment permits the government to consider a person's partisan affiliation when making personnel decisions for high-level policymaking roles. *See, e.g.*, *Branti v. Finkel*, 445 U.S. 507 (1980). In this case, the *absence* of connections to partisan political powerbrokers is key to the "effective performance of the public office involved." *Id*. at 518. If the First Amendment permits the government to prefer one partisan affiliation over another in hiring high-level policymakers, *see id.*, it permits the government to prefer candidates who have avoided partisan politics altogether—equally disqualifying people regardless of their political viewpoints.

challenge to Nevada's law requiring legislators to recuse themselves from voting on, or advocating for passage or defeat of, matters as to which they had a conflict of interest. That law included conflicts arising from a "'commitment to a person' who is a member of the officer's household; is related by blood, adoption, or marriage to the officer; employs the officer or a member of his household; [] has a substantial and continuing business relationship with the officer," or any "'substantially similar'" relationship. *Id.* at 119 (quoting Nev. Rev. Stat. § 281A.420(2) & (8)(a)-(d)).

The Court held that the law did not implicate the First Amendment rights of legislators to vote on legislation, reasoning that conflict-of-interest prohibitions had a long history: "[A] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional." *Id.* at 122 (quotation marks omitted). Just as libel and defamation laws do not violate the First Amendment, the Court explained, neither do "legislative recusal rules." *Id.*

For support, the Court cited "[e]arly congressional enactments," which it noted "'provid[e] contemporaneous and weighty evidence of the Constitution's meaning.'" *Id.* (quoting *Printz v. United States*, 521 U.S. 898, 905 (1997)). Both the United States House and Senate adopted recusal rules within fifteen years of the Founding. The House's rule provided that "[n]o member shall vote on any question, in the event of which he is immediately and particularly interested." *Id.* at 122-23

(quoting 1 Annals of Cong. 99 (1789)). The Court explained that "[m]embers of the House would have been subject to this recusal rule when they voted to submit the First Amendment for ratification; their failure to note any inconsistency between the two suggests that there was none." *Id.* at 123.

Likewise, as President of the Senate, Thomas Jefferson adopted a rule requiring that

> [w]here the private interests of a member are concerned in a bill or question, he is to withdraw. . . . In a case so contrary not only to the laws of decency, but to the fundamental principles of the social compact, which denies to any man to be a judge in his own cause, it is for the honor of the house that this rule, of immemorial observance, should be strictly adhered to.

Id. (quoting A Manual of Parliamentary Practice of the Use of the Senate of the United States 31 (1801)).

The Court further noted that "[f]ederal conflict of interest rules applicable to judges also date back to the founding," *id.*, and that "[a] number of States, by common-law rule, have long required recusal of public officials with a conflict," *id.* at 124; *see id.* (citing *In re Nashua*, 12 N.H. 425, 430 (1841) ("If one of the commissioners be interested, he shall not serve"); *Comm'rs Court v. Tarver*, 25 Ala. 480, 481 (1854) ("If any member . . . has a peculiar, personal interest, such member would be disqualified"); *Stubbs v. Fla. State Fin. Co.*, 118 Fla. 450, 452 (1935) ("[A] public official cannot legally participate in his official capacity in the decision of a question in which he is personally and adversely interested.")).

Moreover, the Court explained that voting by a governmental body does not constitute protected speech under the First Amendment. "[A] legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it." *Id.* at 125-26; *id.* at 127 ("[A] legislator has no right to use official powers for expressive purposes.").

In this case, Michigan exercised its sovereign authority to exclude from the Commission those citizens most likely to have a conflict of interest, or the appearance thereof, in choosing district boundaries for the state legislature and Congress. The Supreme Court has acknowledged the importance of that goal: "[i]ndependent redistricting commissions . . . have succeeded to a great degree [in limiting the conflict of interest implicit in legislative control over redistricting.] They thus impede legislators from choosing their voters instead of facilitating the voters' choice of their representatives." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 821 (2015) (brackets in original).

The Commission's disqualification rules lawfully exclude those with conflicts of interest, or the appearance thereof. The categories of excluded persons under the provision are those whose political careers (and thus paychecks or potential paychecks) are affected by the drawing of lines (*i.e.*, candidates for partisan office

or partisan officeholders); those with a substantial interest in the lines being drawn to advantage particular candidates or who are themselves likely future candidates (*i.e.*, officers or members of governing bodies of political parties); those whose employment may depend upon the lines being drawn to favor or disfavor particular candidates (*i.e.*, paid consultants or employees of candidates or elected officials, employees of the legislature, lobbyists, or employees of lobbyists); and those who are financially supported by people with a political or pecuniary interest in how the lines get drawn (*i.e.*, family members of the above categories of people).

The characteristics identified by Michigan voters as disqualifying a person from voting membership on the Commission are the same types of characteristics that the Supreme Court held that Nevada could rely upon to disqualify government officials from voting on certain matters. *See Carrigan*, 564 U.S. at 119-20. And the categories of disqualified persons are viewpoint-neutral and apply regardless of party. *See id.* at 125.

It does not matter that *Carrigan* involved recusals from particular matters as opposed to disqualification from serving altogether. Unlike most governmental bodies—such as the city council at issue in *Carrigan*—the Commission has only a single matter before it—redistricting. There would be no purpose in permitting someone to be a commissioner but requiring their recusal from voting on the maps; indeed, doing so would risk the Commission being unable to adopt new maps.

Citing the Supreme Court's analysis and holding in *Carrigan*, Judge Readler correctly concluded that this Court "appropriately defer[s] . . . to Michigan's preferred method of self-governance," *Daunt I*, 956 F.3d at 428-29 (Readler, J., concurring), and its desire to prevent conflicts of interest in the redistricting process.

C. Appellants' Invitation for the Court to Disregard *Daunt I* and Apply Strict Scrutiny Should Be Rejected.

Appellants' invitation for the Court to ignore *Daunt I*'s binding precedent and instead apply strict scrutiny to the Commission's eligibility requirements should be rejected. Whether Appellants' claims are assessed under the *Anderson-Burdick* framework or not has no bearing on the outcome of this case—indeed, the alternatives are *greater* deference to Michigan's sovereign choices, not strict scrutiny as Appellants suggest.

1. Appellants' Objection to *Daunt I*'s Consideration of the *Anderson-Burdick* Test Is Misplaced and Does Not Affect the Outcome of this Case.

Appellants take issue with this Court's consideration of their claims under the *Anderson-Burdick* test in *Daunt I.* But this Court did not hold that *Anderson-Burdick* applied, rather it assessed Appellants' claims under both the *Anderson-Burdick* test and the unconstitutional-conditions doctrine and concluded it "need not choose between the two" because "the eligibility criteria are constitutional under either." *Daunt I*, 956 F.3d at 406. That is precisely what this Court did when it upheld

Michigan's term limits for legislators over twenty years ago. *See Miller*, 144 F.3d at 920.[4]

Appellants cite to the Court's rejection of the *Anderson-Burdick* test in *Moncier v. Haslam*, 570 F. App'x 553 (6th Cir. 2014), and contend that "[t]he character of the laws challenged in *Moncier* is parallel to the Commissioner selection" of Michigan's redistricting commission in that "they both involve the selection of government employees," Br. at 20-21. Appellants urge that this case should be treated the same as *Moncier*. *Id.* at 21. That is a curious position, if one presumes Appellants wish to win their lawsuit. In *Moncier* the Court rejected the *Anderson-Burdick* test because that test does not "mandate that states organize their governments in a particular manner . . . or specify how states must fill . . . vacancies." 570 F. App'x at 559. The *Moncier* Court thus affirmed the *dismissal* of the plaintiffs' claim—the *Anderson-Burdick* test was deemed too *restrictive* of the state's right to organize its government. This does not aid Appellants' cause.

[4] The fact that this Court also considered the *Anderson-Burdick* test in the context of qualifications to be a Michigan official over twenty years ago seriously undermines Appellants' contention that the panel veered from Circuit precedent. Appellants contend that *Miller* is "inapposite" because the plaintiffs in that case "were essentially arguing for a right to *vote* for a specific candidate or class of candidates." Daunt Br. at 24 n.4 (emphasis in original). Appellants offer no explanation for how a case that turned on "the State's power to prescribe qualifications for its officeholders," *Miller*, 144 F.3d at 924, could possibly be "inapposite" to their challenge to Michigan's power to prescribe qualifications for its officeholders.

Nor does it aid Appellants to suggest that applying *Anderson-Burdick* is inappropriate "given the competing interests necessitating the *Anderson-Burdick* test," Br. at 24—the right to vote on the one hand, and the "state's heightened interest in administering elections," on the other, *id.* at 19. This case also involves competing interests, and as this Court explained in *Miller*, Michigan's "power to prescribe qualifications for its officeholders"—is "far more important" than its interest in "impos[ing] certain types of regulatory procedures relating to the election process." 144 F.3d at 924. Appellants' suggestion that *Anderson-Burdick* is inapplicable because it involves competing interests thus makes no sense—if anything, *Anderson-Burdick* is *too favorable* to Appellants.

It likewise makes scant sense for Appellants to lean on Judge Readler's *Daunt I* concurrence. Judge Readler agreed with Appellants that *Anderson-Burdick* was inapplicable, but he would have applied a test that is *more deferential* to the State. *Daunt I*, 956 F.3d at 426 (Readler, J., concurring) (concluding that the "deferential approach" identified as an alternative in *Miller* might be the "best" framework because it "affords appropriate deference to a state's strong interest in self-governance"). Under that test, a state's sovereign choices regarding the qualifications for important offices must be upheld unless *plainly* in conflict with the federal Constitution. *Miller*, 144 F.3d at 925. That test emphasizes that "[a]s a sovereign, Michigan deserves deference in structuring its government." This is so

because "the authority of the people of the States to determine the qualifications of their most important government officials . . . is a power reserved to the States under the Tenth Amendment and guaranteed them by [the Guarantee Clause] of the Constitution." *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991)).

Judge Readler would have upheld the Commission's eligibility criteria under this test. *Daunt I*, 956 F.3d at 426-27. He likewise took no issue with the panel majority's decision to uphold the eligibility criteria under the unconstitutional-conditions doctrine. Ultimately, all three potential tests identified in the panel's majority and concurring opinions balance the State's interest in structuring its government with Appellants' asserted speech interests. Under all three tests, Michigan's interest in structuring its government prevails, as every federal judge to consider this case has concluded. Even if this Court agrees with Appellants that the *Anderson-Burdick* test is best confined to challenges to election regulations, the result is not strict scrutiny, as Appellants contend, but rather an even *more* deferential test.

2. Appellants' Unconstitutional Conditions Arguments Ignore *Daunt I* and Are Foreclosed by the Case Law They Cite.

Appellants contend that their claims survive under the unconstitutional conditions doctrine, urging this Court to apply strict (or heightened, or exacting) scrutiny. But this argument suffers from the same flaw as their objection to

Anderson-Burdick—regardless of what one calls the applicable test, Michigan's weighty sovereign interests outweigh Appellants' First Amendment interests.

Appellants rely in particular upon *Autor v. Pritzker*, 740 F.3d 176 (D.C. Cir. 2014), a case they contend "is remarkably akin to the present [case]," Br. at 27. In *Autor*, a group of federally registered lobbyists challenged a ban on lobbyists serving on federal advisory committees. 740 F.3d at 177. The district court dismissed their First Amendment claim, but the D.C. Circuit reversed, concluding that they had stated a potential First Amendment claim because advisory committee membership was conditioned on foregoing the right to petition the government as lobbyists. *Id.* at 183.

Appellants contend this case is nearly identical to *Autor*, but omit from their brief the actual resolution of *Autor*. The D.C. Circuit did not, after concluding the First Amendment claim was viable, apply strict (or heightened) scrutiny and undertake an analysis of whether the lobbyist ban was "narrowly tailored," "over- or under-inclusive," or the "least restrictive means among available, effective alternatives," as the Appellants contend this Court should do, *see* Br. at 30-47. Instead, the court noted that "[t]he Supreme Court has long sanctioned government burdens on public employees' exercise of constitutional rights that would be plainly unconstitutional if applied to the public at large." *Autor*, 740 F.3d at 183 (internal quotation marks omitted). The court explained that "although [advisory committee]

service differs from public employment, the government's interest in selecting its advisors . . . implicates similar considerations that we believe may justify similar restrictions on individual rights." *Id.* at 183-84 (citation omitted). Citing *Pickering v. Board of Education*, 391 U.S. 563 (1968), the court concluded that the district court on remand would have to undertake a *Pickering* balancing analysis that weighs "the interest of the [individual] . . . and the interest of the State" to determine whether the government's interest in banning lobbyists was sufficient to outweigh the burden imposed on their speech rights. *Daunt I*, 956 F.3d at 184 (quoting *Pickering*, 391 U.S. at 568) (bracket in original).

The *Pickering* balancing test "requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick v. Myers*, 461 U.S. 138, 150 (1983). Because interference with a public employer's work can detract from the function of a public employer, "avoiding such interference can be a strong state interest." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). "[E]ven termination because of protected speech may be justified when legitimate countervailing government interests are sufficiently strong. . . . [T]he government's interest in achieving its goals as effectively and efficiently as possible is elevated . . . to a significant one when it acts as employer." *Bd. of Cty. Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 675-76 (1996) (internal quotation marks omitted).

While Appellants herald *Autor*, they shun the *Pickering* balancing test (without mentioning that application of *Pickering* was the disposition of *Autor*). Appellants contend that the *Pickering* test is inapplicable because it "examines whether an 'employee's free speech interests outweigh the *efficiency interests* of the government as employer.'" Br. at 32 (quoting *Scarbrough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 255 (6th Cir. 2006) (emphasis in original)). Appellants contend that "Defendants do not justify the exclusionary criteria as promoting efficient operation of the Commission, but rather preventing conflicts of interest in the redistricting process." Br. at 33. But one obvious purpose of preventing conflicts of interest *is* to promote the efficient operation of the government. *See, e.g.*, *U.S. Civil Serv. Comm'n*, 413 U.S. at 564 ("[T]he judgment of Congress, the Executive, and the country appears to have been that partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences.").

Pickering is not the wrong test because government efficiency is not at issue here—it is. *Pickering* is the wrong test because this case involves a "far more important interest: the State's power to prescribe qualifications for its officeholders." *Miller*, 144 F.3d at 924.

For that reason, Appellants' contention that a "modified 'exacting scrutiny' under *Pickering* and *Janus[v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018)]" applies also fails. Br. at 34. For the first time in the second appeal of this case, Appellants contend that this "modified exacting scrutiny"—whatever that means—should apply, citing the Supreme Court's decision in *Janus*, in which the Court invalidated laws requiring public employees to pay mandatory dues to public sector unions. Br. at 33-34. Not so. First, Appellants did not raise this argument below and it is therefore waived. *See Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008) ("[A]n argument not raised before the district court is waived on appeal to this Court."). Second, although *Janus* explained that *Pickering* scrutiny is more robust when broad categories of employees are affected, 138 S. Ct. at 2472, that observation bears only on the standard *Pickering* analysis where government efficiency is the sole countervailing interest. That is not the case here. *See supra.* Third, *Janus* highlighted that more exacting scrutiny was necessary in that case because it involved "government compel[led] speech or speech subsidies in support of third parties." *Id.* at 2473. But as this Court explained in *Daunt I*, this case involves no direct speech regulations at all. 956 F.3d at 409.

At bottom, Appellants' arguments all suffer from the same defect: they ignore Michigan's fundamental interest in setting the qualifications for its important officeholders. Most of Appellants' arguments—the pages upon pages of out-of-

context quotes from various inapplicable lines of First Amendment jurisprudence—are thus entirely misplaced because they do not grapple at all with the Supreme Court's or this Court's precedent (including this Court's holding *in this case*) affirming Michigan's fundamental interest in structuring its government.[5]

It does not matter what one calls the test through which the Court adjudicates Appellants' claims. What is clear—as this Court has already held in *Daunt I*—is that Appellants' First Amendment interests do not overcome Michigan's sovereign interest in determining the qualifications for service as a Commissioner.

III. The Commission's Disqualification Rules Do Not Violate the Equal Protection Clause.

The Commission's disqualification rules likewise do not violate the Equal Protection Clause. To withstand a challenge under the Equal Protection Clause, "statutes that do not interfere with fundamental rights or single out suspect classifications must bear only a rational relationship to a legitimate state interest." *Richland Bookmart, Inc. v. Nichols*, 278 F.3d 570, 574 (6th Cir. 2002).

In this case, the Commission's disqualification rules do not target any suspect class or interfere with any fundamental rights, including those guaranteed by the

[5] For that reason, Appellants' lengthy dissection of each aspect of the Commission's disqualification rules is misplaced. This Court's task is not to look under every stone and decide how Michigan should have tinkered with the Commission's structure; rather, this Court's task is to defer to Michigan's choice so long as there are no *plain* constitutional violations.

First Amendment. Appellants base their equal protection claim on their contention that the eligibility rules are over- and under-inclusive, relying on a strict scrutiny framework. Br. at 48-50.[6] In doing so, they essentially bootstrap their First Amendment claim. *Id.* at 48 (citing to First Amendment claims as basis for alleged Equal Protection violations). But there is no First Amendment violation, *see supra* Part II; *Daunt I*, 956 F.3d at 406. Because the disqualification rules do not burden a fundamental right or a suspect class, rational basis review applies.

The Supreme Court and the Sixth Circuit have rejected under-inclusiveness arguments like those raised by the Appellants so long as the distinction between classes is not "the result of invidious discrimination." *Richland*, 278 F.3d at 576 (citing *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955), for the proposition that legislatures may properly "take one step at a time" in making reform); *see also Clements*, 457 U.S. at 971 ("A [law] is not devoid of a rational [basis] simply because it happens to be incomplete.").

The disqualification rules have a rational basis. Michigan voters have adopted a sensible system to identify and disqualify those with a direct or indirect political or financial interest in the outcome of redistricting. For example, employees of elected officials are disqualified because they have a direct pecuniary interest in their

[6] Appellants object that the district court's analysis of their Equal Protection claim was "sparse." Br. at 48. But Appellants' own analysis of their Equal Protection claim is no less sparse—spanning 2.5 pages with little new content. *See id*. at 48-50.

boss's reelection prospects, whereas volunteers do not. Candidates and elected officials to partisan offices stand to gain politically from new maps, whereas candidates to statewide nonpartisan offices do not. Family members likewise have a conflict, or at least the appearance of one. *Cf. Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (noting that the government's interest in preventing the "appearance of corruption" is "[o]f almost equal concern as the danger of actual quid pro quo arrangements" and sufficient to withstand heightened scrutiny, let alone rational basis).

Moreover, Appellants offer nothing to suggest that the people of Michigan were motivated by "invidious" discriminatory intent. *Richland*, 278 F.3d at 576. The Commission's disqualification rules do not violate the Equal Protection Clause.[7]

IV. Any Constitutionally Infirm Aspects of the Commission Are Severable.

Even if any aspect of the Commission were constitutionally infirm, it would be severable from the remaining provisions. Appellants' contention otherwise is incorrect.[8]

[7] Appellants say the Amendment was actually a conspiracy to stack the Commission with Detroit officials elected as nonpartisans, but who are really partisan Democrats. Br. at 39 n.10. More than 9,000 Michiganders applied to be randomly selected for 13 positions. Republican legislative leaders had the opportunity to strike 10 finalists. If this was a ruse designed to seat Democratic politicians, then they need to hire a new chief conspirator.

[8] It is also ironic, given Appellants' contention that they wish to serve on the Commission they are simultaneously arguing should be fully invalidated.

The Michigan Supreme Court "has long recognized that '[i]t is the law of this State that if invalid and unconstitutional language can be deleted from a[] [law] and still leave it complete and operative then such remainder of the [law] be permitted to stand.'" *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 806 N.W.2d 683, 713 (Mich. 2011) (quoting *Eastwood Park Amusement Co. v. East Detroit Mayor*, 38 N.W.2d 77, 81 (Mich. 1949)); *see also People v. McMurchy*, 228 N.W. 723, 727-28 (Mich. 1930) ("The constitutionality of a law that is complete in itself, without certain provisions that may be omitted, will remain constitutional if such objectionable parts are omitted."). Under this reasoning, severability follows even where a provision does not include a severability clause. "[U]nconstitutional provisions may be severed even absent a severability clause if, among other conditions, 'it is clear from the [law] itself that it was the intent of the [voters] to enact these provisions irrespective of the others.'" *Constitutionality of 2011 PA 38*, 806 N.W.2d at 713 (quoting *Eastwood Park*, 38 N.W.2d at 82). And where a law *contains* a severability clause, it is clear that in Michigan, as in most places, the remainder of it should be upheld. *See Civil Service Comm'n of Mich. v. Auditor Gen.*, 5 N.W.2d 536, 541 (Mich. 1942) ("As the act specifically contains a 'severability clause,' the remainder of the law is valid.").[9]

[9] A similar standard is applied under federal law. *See, e.g., Barr v. Am. Ass'n of Political Consultants,* 140 S. Ct. 2335, 2351-52 (2020) (noting there is a "strong presumption of severability" and it is "fairly unusual for the remainder of [a] law not

In this case, the voters adopted a severability clause:

> 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). Appellants contend that "[n]otwithstanding 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," Br. at 51, and further argue that where a ballot initiative is concerned, the absence of a record as to enactors' intent weighs strongly towards non-severability. *See id.* at 52. Not so.

The cases cited by the Appellants do not support their contention, because they all involve the standard applied in the *absence* of a severability clause. *See Constitutionality of 2011 PA 38*, 806 N.W.2d at 713 (discussing standard to apply "absent a severability clause"); *McMurchy*, 228 N.W. at 727-28 (same); Mich. Att'y Gen. Op. 7309 at 19-21 (2019) (applying general statutory severability provision in absence of specific provision contained in statute at issue); *In re Apportionment of*

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to be operative")*; Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020)*; Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) ("Unless it is evident that the [enacting body] would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law" (quoting *Buckley v. Valeo*, 424 U.S. at 108)); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987) ("This Court has held that the inclusion of such a clause creates a presumption that [the enacting body] did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision.").

State Legislature-1982, 321 N.W.2d 565 (Mich. 1982) (discussing severability of state constitutional provisions without mention of a severability clause); *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 191 (1999) (stating that "President Taylor intended [his] 1850 [executive] order to stand or fall as a whole").

Appellants thus provide no support for their contention that this Court should look beyond the plain text of the severability clause the voters enacted. Rather, the Michigan Supreme Court has made clear that such clauses govern: "As the [Amendment] specifically contains a 'severability clause,' the remainder of the law is valid." *Civil Service Comm'n*, 5 N.W.2d at 541.

Even if it were appropriate to look beyond the severability clause, it is clear the voters would have intended the remainder of the amendment to continue to operate. The primary intent of the amendment—to establish an independent redistricting commission that would create a "fair, impartial, and transparent process" for redistricting[10]—can still be advanced without the disqualification provisions. The summary of the amendment, in bold lettering at the top of the ballot proposal, states "**A proposed constitutional amendment to establish a commission of citizens with exclusive authority to adopt district boundaries for the Michigan Senate, Michigan House of Representatives and U.S Congress,**

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

every 10 years" (emphasis in original).[11] The amendment contains twenty-two paragraphs regulating the Commission—including creating a large, representative pool of candidates and random selection of commissioners, including transparency measures, establishing redistricting criteria, prohibiting partisan gerrymandering, and establishing rules that ensure a range of support across the political spectrum. Mich. Const. art. IV, §§ 6(2)-(22). All of these provisions can continue to operate if the single subsection dealing with the disqualification rules were invalidated. To throw out the whole amendment based on that single invalidation would disregard the *entire purpose* behind the voters' passage of the amendment.

Appellants' contention that voters would have preferred the status quo over a Commission without disqualification rules thus makes no sense.[12] Br. at 54-55. If the entire Commission is invalidated, the redistricting process will be *guaranteed* to be in the hands of the very people Michigan's voters sought to disqualify from drawing district lines—the legislature. And the legislature will not be constrained by any of the lawful criteria voters adopted. On the other hand, even if otherwise

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[11] Michigan Senate Fiscal Agency, *November 2018 Ballot Proposal 18-2*, https://www.senate.michigan.gov/SFA/Publications/BallotProps/Proposal18-2.pdf (last viewed Feb. 3, 2020).

[12] *See, e.g., Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010) ("[N]othing in the . . . text or historical context makes it 'evident' that [the enacting body], faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will").

disqualified persons became commissioners, the other protections adopted by the voters, such as the redistricting criteria, would vindicate the voter's redesign of the redistricting process to "ensure that [it] can no longer be dominated by one political party." *Citizens Protecting Michigan's Constitution*, 922 N.W.2d at 410.

Moreover, the amendment is "complete and operative" without the eligibility provisions. *Constitutionality of 2011 PA 38*, 806 N.W.2d at 713. If the eligibility provisions were excised, there would be no gaps to fill in the law, no loopholes, and no guessing as to how the amendment would operate.

Finally, Appellants also rely upon *In re Apportionment of State Legislature-1982*, which addressed the Redistricting Commission created by the Michigan Constitution of 1963 as originally approved, but that case is also inapposite. In that case, the Michigan Supreme Court concluded that the constitutional redistricting criteria adopted by the voters were unlawful, and held that the provisions at issue could not be severed because:

> [w]hen the weighted land area/population apportionment formulae fell, all the apportionment rules fell because they are inextricably related. The commission cannot survive without apportionment rules. . . . The notion that the people of this state confided to an apportionment commission without apportionment rules absolute discretion to reapportion the Legislature and thereby reallocate political power in this state limited only by human ingenuity and by no federal constitutional standard that a computer cannot circumvent is unthinkable.

In re Apportionment of State Legislature-1982, 321 N.W.2d at 582.

The Commission's essential "apportionment rules" have not been challenged here and remain in place as a check on the "discretion [of commissioners] to reapportion the Legislature and thereby reallocate political power," no matter which applicants are selected as commissioners. *Id*. Further, as explained above, the disqualification provisions are in no way "inextricably related" to any other provision of the amendment. *Id.*

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The Supreme Court specifically highlighted, as a solution to partisan gerrymandering, the fact that "in November 2018, voters in . . . Michigan approved constitutional amendments creating multimember [independent redistricting] commissions." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). This Court should reject Appellants' effort to overturn the voters and return to unconstrained gerrymandering.

CONCLUSION

For the foregoing reason, the district court's order should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 23(a)(7)(B) and 6th Cir. R. 32(b) because it contains 10,888 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).

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CERTIFICATE OF SERVICE

I certify that on December 14, 2020, an electronic copy of the foregoing Brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Sixth Circuit, using the appellate CM/ECF system. I further certify that all parties in this case are represented by lead counsel who are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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