No. 20-1734

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY DAUNT; TOM BARRETT; AARON BEAUCHINE; KATHY BERDEN; STEPHEN DAUNT; GERRY HILDENBRAND; GARY KOUTSOUBOS; LINDA LEE TARVER; PATRICK MEYERS; MARIAN SHERIDAN; MARY SHINKLE; NORM SHINKLE; PAUL SHERIDAN; BRIDGET BEARD; CLINT TARVER, 1:19-cv-00614

Plaintiffs-Appellants,

and

MICHIGAN REPUBLICAN PARTY, 1:19-cv-00669

Plaintiff,

v.

JOCELYN BENSON, in her official capacity as Michigan Secretary of State; COUNT MI VOTE, doing business as Voters Not Politicians,

Defendants-Appellees.

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

BRIEF FOR DEFENDANT-APPELLEE SECRETARY OF STATE JOCELYN BENSON

Dana Nessel
Michigan Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General

Erik A. Grill (P64713)
Heather S. Meingast (P55439)
Assistant Attorneys General
Attorneys for Defendant-
Appellee Benson
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: grille@michigan.gov
Email: meingasth@michigan.gov

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs-Appellants have requested oral argument. However, Defendant-Appellee Michigan Secretary of State Jocelyn Benson does not request oral argument because she believes that oral argument is unnecessary for the Court to decide the issues presented in this appeal of the District Court's well-reasoned opinion and that the issues raised in this appeal are reasonably resolved by established law—including this Court's earlier opinion deciding the same constitutional arguments raised in this appeal.

JURISDICTIONAL STATEMENT

Defendant-Appellee Michigan Secretary of State Jocelyn Benson concurs in the Plaintiffs-Appellants' Statement of Jurisdiction.

STATEMENT OF ISSUES PRESENTED

1. Whether the amendment to Michigan's constitution creating an independent citizens redistricting commission does not violate the First Amendment.

2. Whether the District Court correctly concluded that the eligibility criteria for Michigan's independent redistricting commission were constitutional under both the *Anderson-Burdick* and the "unconstitutional conditions" tests.

3. Whether the amendment to Michigan's constitution creating an independent citizens redistricting commission does not violate the Equal Protection Clause of the Fourteenth Amendment.

4. Whether parts of the Michigan Constitution creating the independent redistricting commission—if found to be unconstitutional—could be severed from the parts that were not unconstitutional.

INTRODUCTION

This appeal—like the earlier appeal from the denial of the preliminary injunction—centers on one question: who gets to decide how the people will be governed—the people themselves, or candidates and party officials? The issue of partisan gerrymandering continues to be one of the most contentious in our modern political landscape. In holding in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019), that partisan gerrymandering is non-justiciable, the U.S. Supreme Court pointed to the establishment of independent redistricting commissions as a means to address this problem. That opinion specifically cited to Michigan's 2018 adoption of article 4, § 6 of the Michigan Constitution as one way for states to restrict partisan considerations in redistricting. *Id.* ("We express no view on any of these pending proposals. We simply note that the avenue for reform established by the Framers, and used by Congress in the past, remains open.")

Indeed, through that amendment, the people of the State of Michigan overwhelmingly chose to avail themselves of their avenue for reform. They no longer desired to have their electoral districts decided by elected officials, party officials, or any others with a stake in the

outcome. They chose to create an independent commission comprised of voters chosen randomly from three separate pools of applicants in such a way as to, as closely as possible, mirror the geographic and demographic makeup of the state. Voters will now choose their elected officials rather than have their elected officials choose their voters.

This lawsuit presented a variety of challenges to the essence of this amendment. At the most basic level of this case, the Plaintiffs sought to override the will of the people and demanded that the District Court—and, now, demand that this Court—declare, as a matter of constitutional law, that the people's attempt to create an independent, politically balanced redistricting process be enjoined and nullified. They argue, in essence, that those with a stake in the outcome *must* be included in the process of drawing those districts, and that any effort to proceed without them is constitutionally impossible. For the reasons that follow, Secretary of State Benson maintains that the First and Fourteenth Amendments place no such bounds on the ability of a free people to govern themselves, that Plaintiffs' arguments are legally unsound and unpersuasive, and that Plaintiffs' claims were properly dismissed.

STATEMENT OF THE CASE

A. Redistricting in Michigan before Proposal 2

Before addressing the new amendments, it is helpful to understand Michigan's redistricting history. In 1963, through the new Constitution, the people of Michigan enacted a process for apportionment, now generally referred to as redistricting. *See* Mich. Const. 1963, art. 4, §§ 2-6 (as enacted). The Constitution created the Commission on Legislative Apportionment and charged that Commission with establishing House and Senate districts in conformity with certain standards prescribed by the Constitution. *Id.* If the commission failed to approve a plan, the proposed plans were to be submitted to the Michigan Supreme Court for its review and approval of the plan that best met the constitutional criteria. *Id.*

The commission consisted of "eight electors, four of whom shall be selected by the state organizations of each of the two political parties whose candidates for governor received the highest vote at the last general election at which a governor was elected preceding each apportionment." *Id.* Each political party, however, was required to choose members from four prescribed geographic areas. *Id.* And the

Constitution rendered ineligible from serving on the commission "officers or employees of the federal, state or local governments," and thereafter precluded commission members from "election to the legislature until two years after the apportionment plan in which they participated" became effective. *Id.*

The Secretary of State served as the non-voting "secretary" of the commission and provided it with "all necessary technical services." The commission made its own rules and was to "receive compensation provided by law." And the Legislature was required to "appropriate funds to enable the commission to carry out its activities." *Id.*

Shortly after the enactment of these constitutional provisions, the U.S. Supreme Court in *Reynolds v. Sims* declared apportionment criteria similar to Michigan's unconstitutional. 377 U.S. 533 (1964). The Michigan Supreme Court ordered the commission to establish a plan consistent with *Reynolds*, which the commission failed to do, and the Michigan Supreme Court thereafter ordered the commission to adopt the one plan that was based on appropriate standards. *In re Apportionment of State Legislature-1964*, 128 N.W.2d 722 (1964).

In 1972, the commission again failed to agree on a plan, and the Michigan Supreme Court again ordered the commission to approve the plan that best met the constitutional criteria. *In re Apportionment of State Legislature–1972*, 197 N.W.2d 249 (1972). Likewise, in 1982 the commission again failed to agree upon a plan, and the competing plans were submitted to the Michigan Supreme Court. *In re Apportionment of State Legislature–1982*, 321 N.W.2d 565, 571 (1982). But this time the Michigan Supreme Court ordered the commission to address whether it continued to have authority to act given the constitutional invalidity of certain apportionment criteria. *Id.* The Court ultimately held that the valid rules were "inextricably interdependent and therefore [ ] not severable" from the invalid rules, and that "the function of the commission, which depends on those rules, and indeed the commission itself, [were] not severable from the invalidated rules." *Id*. at 572. The Court thus ordered the former director of elections for Michigan to draw a plan consistent with standards articulated by the Court, which the Court would review and approve after a public hearing. *Id*. at 583.

Due to the invalidity of the constitutional apportionment provisions, the next three redistricting plans—1991[1], 2001, and 2011—were drawn by the Legislature. In 2017, a lawsuit was filed in federal court challenging the 2011 plan, *see* Mich. Comp. Laws §§ 3.51a, 4.2001a, and 4.2002a, as an unconstitutional partisan gerrymander, s*ee League of Women Voters*, 373 F. Supp. 3d 867 (E.D. Mich. 2019).

B. Redistricting in Michigan after Proposal 2

Also in 2017, Intervening Defendant Count MI Vote d/b/a/Voters Not Politicians (VNP), a ballot proposal committee, filed an initiative petition to amend the Michigan Constitution signed by more than 425,000 voters. *See Citizens Protecting Michigan's Constitution v. Secretary of State, et al.*, 922 N.W.2d 404, 409-410 (Mich. Ct. App. 2018). The proposal principally sought to amend the apportionment provisions in article 4, § 6 discussed above. The Michigan Court of Appeals rejected a challenge to the placement of the proposal on the November 2018 general election ballot, *id.* at 433-434, and the Michigan Supreme Court affirmed that rejection in *Citizens Protecting Michigan's*

[1] The Michigan Supreme Court ended up approving a plan for the 1991 cycle as well. *See In re Apportionment of State Legislature–1992*, 483 N.W.2d 52 (1992) and *In re Apportionment of State Legislature–1992*, 486 N.W.2d 639 (1992).

Constitution v. Secretary of State, et al., 921 N.W.2d 247, 270-278 (Mich. 2019).

Identified as Proposal 18-2 on the November 6, 2018 general election ballot, the proposal passed overwhelmingly.[2] The amendments became effective December 22, 2018. *See* Mich. Const. 1963, art. 12, § 2.

1. Functions of the Independent Citizens Redistricting Commission

The amendments re-establish a commission—now the Independent Citizens Redistricting Commission—charged with redrawing Michigan's congressional and state legislative districts according to specific criteria. Mich. Const. 1963, art. 4, § 6(1), (13). The amendments prescribe eligibility criteria and a complex selection process for membership on the Commission. *Id.*, § 6(1)-(2). The Commission is granted authority to provide for its own rules and processes, and the Legislature must appropriate money to compensate the commissioners and to enable the Commission to perform its functions. *Id.*, § 6(4)-(5). The Secretary of State acts as a non-voting secretary to the Commission, and "in that capacity shall furnish, under

[2] 2018 Michigan Election Results, available at https://mielections.us/election/results/2018GEN_CENR.html.

the direction of the commission, all technical services that the commission deems necessary." *Id.*, § 6(4). The Commission must hold public hearings both before and after drafting plans and must ultimately approve a plan for each district. *Id.*, § 6(8)-(9), (14). The Michigan Supreme Court may review a challenge to any plan adopted by the Commission. *Id.*, § 6(19).

2. Selection of the Independent Citizens Redistricting Commission

As amended, article 4, § 6 requires the Commission to consist of 13 commissioners (rather than the previous 8 members). *Id.*, § 6(1). The 13 commissioners must include four commissioners who affiliate with the Republican Party, four commissioners who affiliate with the Democratic Party, and, unlike the prior commission, five commissioners who do not affiliate with either major party. *Id.*, § 6(2)(f).[3] In order to meet this requirement, and to funnel applicants into the right pools, persons applying to the Commission must complete an application and "attest under oath . . . either that they affiliate with one of the two political parties with the largest representation in the legislature . . .

[3] Section 6 does not specifically refer to the Republican Party or the Democratic Party but refers to the "major parties" with the "largest representation in the legislature." Mich. Const. 1963, art. 4, § (2)(a)(iii).

and if so, identify the party with which they affiliate, or that they do not affiliate with either of the major parties." *Id.*, § 6(2)(a)(ii)-(iii).

Completed applications then undergo a random selection process using a weighted statistical method to ensure that applicants drawn for each pool geographically and demographically mirror the makeup of the State. *Id.*, § 6(2)(d). The randomly selected applications for each pool must then be submitted to the majority and minority leaders of the Michigan House and the Michigan Senate, who "may each strike five applicants from any pool or pools, up to a maximum of 20 total strikes by the four legislative leaders." *Id.*, § 6(2)(d)(iii), (e). After that, the Secretary of State "shall randomly draw the names of four commissioners for each of the two pools of remaining applications affiliating with a major party, and five commissioners from the pool of remaining non-affiliating applicants." *Id.*, § 6(2)(f).

Once selected, each commissioner holds office until the Commission has completed the redistricting process for the applicable census cycle. *Id.*, § 6(18). Each commissioner must "perform his or her duties in a manner that is impartial and reinforces public confidence in the integrity of the redistricting process." *Id.*, § 6(10). The Commission

must conduct its business at open meetings and encourage public participation, *id*., §6 (10), but commissioners "shall not discuss redistricting matters with members of the public outside of an open meeting of the commission," unless certain exceptions apply, *id*., § 6(11). Also, commissioners "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 . . . performs his or her duties." *Id*., § 6(11).

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." *Id*., § 6(14)(c). This means that at least 7 members must vote to approve a plan—2 Republicans, 2 Democrats, 2 unaffiliated commissioners, and one more commissioner of any category. If no plan is approved, a plan will be randomly selected under a ranked point system. *Id*., § 6(14)(c).

To be eligible for selection to the Commission, an applicant must be a registered voter eligible to vote in Michigan, *id*., § 6(1)(a), and not

be otherwise disqualified from holding an elective or appointive office under another provision of the Michigan Constitution, *id.*, § 6(1)(d), or under article 4, § 6, as amended. Thus, persons associating with any political party (major or minor), or persons who associate with no party at all, are eligible to apply to the Commission.

Section 6, however, renders ineligible an individual from serving as a commissioner if, within the last six years, the person was or is:

> (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 [11], 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[.] [*Id.*, § 6(1)(a), (b)(i)-(vii).][4]

Section 6 further renders ineligible "a parent, stepparent, child, stepchild, or spouse of any individual disqualified under" the quoted provisions. *Id.*, § 6(1)(c).

Those applying for the Commission must "attest under oath that they meet the qualifications" described above. *Id.*, § 6(2)(a)(iii). The Secretary of State must "[e]liminate . . . applications of applicants who do not meet the qualifications in parts (1)(a) through (1)(d) of [§6] based solely on the information contained in the applications." *Id.*, § 6(2)(d)(i). (This provision does not apply to the attestation of party or no-party affiliation, which is required under § 6(2)(a)(iii).)

Secretary Benson created an application form and drafted eligibility guidelines to assist voters in applying for appointment to the Commission.[5] Creating the application form is the Secretary of State's obligation under § 6(2)(a), and providing guidance regarding the terminology used in § 6(1)(a)-(d) is consistent with this obligation.

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[4] Certain of these exclusions echo former § 6, which prohibited "officers and employees of the federal, state, or local governments" from serving on the former apportionment commission. Mich. Const. 1963, art. 4, § 6 (as enacted).

[5] https://www.michigan.gov/sos/0,4670,7-127-1633_91141---,00.html.

(*Daunt* Mot. for P.I., Ex. A, R. 4-1, Page ID # 93-99; Ex. B, R. 4-2, Page ID # 100-109.) The Secretary of State began accepting mailed and online applications for appointment to the Commission in January 2020. The deadline for applying was June 1, 2020.

The commissioners for this redistricting cycle were selected on August 17, 2020,[6] and the Commission has commenced meeting as required by the constitution.[7]

C. Procedural history.

The Plaintiffs filed their complaint and motion for preliminary injunction on July 30, 2019. (Compl., R. 1, Page ID # 1-49; Mot. for P.I., R. 4, Page ID # 53-154.) On August 12, 2019, VNP moved to intervene as a Defendant. (VNP Mot., R. 11, Page ID # 167-169.) The District Court granted the motion on August 23, 2019. (Order, R. 23, Page ID # 262-265.) The Michigan Republican Party filed a similar complaint and motion for preliminary injunction on August 22, 2019. Secretary Benson moved to consolidate the cases. (Mot., R. 27, Page ID # 314-

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[6] *See History made with selection of 13 commissioners to redraw election districts statewide*, 8/17/20, available at https://www.michigan.gov/sos/0,4670,7-127-1640_9150-536996--,00.html.

[7] See, generally, the Commission's website available at https://www.michigan.gov/sos/0,4670,7-127-1633_91141---,00.html.

319.) The District Court granted consolidation on September 11, 2019. (Order, R. 30, Page ID # 333-335.) In the same order, the Court issued a consolidated briefing schedule regarding the motions for preliminary injunction, with Defendants briefs due September 19, 2019, and Plaintiffs' replies due October 3, 2019. *Id.* Secretary Benson timely filed her responses to the motions for preliminary injunction, (*Daunt* Benson P.I. Brf, R. 39, Page ID # 523-586; *MRP* Benson P.I. Brf, R. 37, Page ID # 479-483), and filed motions to dismiss in both cases as well. (*Daunt* Benson MTD, R. 42, Page ID # 591-596; *MRP* Benson MTD, R. 40, Page ID # 587-588.) The District Court denied the motions for preliminary injunction on November 25, 2019. (Op., R. 67, Page ID # 926-971.)

The Plaintiffs in both cases filed their notices of appeal on November 26, 2019, (*Daunt* NOA, R. 69, Page ID # 974-976), and on December 5, 2019. (*MRP* NOA, R. 77, Page ID # 1071-1073.) On April 15, 2020, this Court issued its opinion affirming the denial of the preliminary injunction and holding that the challenges to the criteria for eligibility to apply for the redistricting commission were unlikely to

succeed. *Daunt v. Benson*, 956 F.3d 396 (2020). This Court denied rehearing *en banc* on June 19, 2020, after no judge requested a vote.

On July 7, 2020, the District Court granted the Secretary of State's motions to dismiss in both cases. (Op., R. 75, Page ID # 1035-1059.) The *Daunt* Plaintiffs filed their notice of appeal on August 3, 2020. (NOA, R. 77, Page ID # 1071-1073.) The plaintiffs in the *MRP* case did not appeal.

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal of a complaint under Fed. R. Civ. P. 12(b)(6). *Int'l Outdoor, Inc. v. City of Troy,* 974 F.3d 690, 701 (6th Cir. 2020). Fed. R. Civ. P. 12(b)(6) permits dismissal for failure to state a claim upon which relief can be granted. The Plaintiffs must show that the complaint alleges a claim under federal law, and that the claim is substantial. Under Rule 12(b)(6), a complaint may be dismissed if no relief could be granted under any set of facts that could be proved consistent with the allegations of the complaint. *Ludwig v. Bd. of Trustees*, 123 F.3d 404, 408 (6th Cir. 1997). The court must construe the complaint in the light most favorable to the plaintiffs, accept all factual allegations as true,

and determine whether it is established beyond a doubt that plaintiffs can prove no set of facts in support of his claim that would entitle him to relief. *Trzebuckowski v. City of Cleveland*, 319 F.3d 853, 855 (6th Cir. 2003). However, the Court need not accept as true legal conclusions or unwarranted factual inferences. *Murphy v. Sofamor Danek Group*, 123 F.3d 394, 400 (6th Cir. 1997).

SUMMARY OF ARGUMENT

First, the District Court properly dismissed Plaintiffs' First Amendment claims because this Court already concluded as part of Plaintiffs' appeal of their preliminary injunction motion that the eligibility criteria for Michigan's Commission are constitutional under *either* the *Anderson-Burdick* or the "unconstitutional conditions" test. *Daunt v. Benson,* 956 F.3d 396, 406 (6th Cir. 2020). Plaintiffs failed to produce any new facts or law that would compel the District Court—or this Court—to reach a different conclusion. Moreover, the *Anderson-Burdick* framework does properly apply to the Commission because it fundamentally concerns matters that are intrinsic and essential to the administration of elections. Plaintiffs' reliance on Judge Readler's concurring opinion in the appeal of the preliminary injunction is

misplaced because that opinion nonetheless concluded that the eligibility criteria were constitutional.

Second, this Court also concluded in the earlier appeal that the eligibility criteria would still be constitutional under the "unconstitutional conditions" framework that Plaintiffs once again urge here. Plaintiffs' arguments seeking to distinguish the cases on which this Court relies were not raised before the District Court, but nonetheless are unpersuasive and fail to demonstrate why this Court should reach a different result now.

Third, Plaintiffs' claim alleging that the eligibility criteria violate equal protection fails for the same reasons as the First Amendment claim. That is, under *Anderson-Burdick*, the burden on Plaintiffs is not severe while there is a compelling state interest in reducing or eliminating "partisan meddling" in the redistricting process.

And *fourth*, if the eligibility criteria were held unconstitutional, they could be severed, as explicitly provided in Michigan's Constitution.

ARGUMENT

I. The District Court properly granted the Secretary's motion to dismiss because Plaintiffs failed to state a claim that the Commission's eligibility criteria violated the First Amendment.

Plaintiffs initially argue that the District Court failed to appropriately analyze the motion to dismiss, and instead simply relied on this Court's opinion upholding the denial of Plaintiffs' motion for preliminary injunction. (Doc 20, Appellants' Br., p 15-16.) This is not an accurate characterization of the District Court's opinion and order granting the motion to dismiss. In fact, the District Court dedicated roughly two pages of its opinion explaining—in detail—the effect of prior rulings on the motion before it. (Op., R. 75, Page ID # 1053-55.) As part of that analysis, the District Court explicitly recognized that findings of fact and conclusions of law regarding a preliminary injunction are not binding at trial on the merits. (*Id.* at 18) (quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). But it also recognized that the law-of-the-case doctrine applied to govern the outcome of the same issues in subsequent stages of the same case. (*Id.* at 19).

The District Court's opinion makes it clear that—regardless of whether this Court's appellate decision should be given effect as law of the case—the District Court found this Court's opinion to be a persuasive analysis. (Op., R. 75, Page ID # 1055.) As the District Court aptly observed, this Court's opinion was particularly useful since the parties had largely relied on the same arguments raised during the preliminary injunction stage. (*Id.*).

That the District Court referred to this Court's review of the same arguments does not mean that the District Court failed to conduct its own analysis. It is not unusual for district courts to refer to the opinions of appellate courts in reaching their own decisions. Moreover, this Court's earlier decision found that the burden imposed on the Plaintiffs was "relatively insignificant," while the State of Michigan has a compelling interest in limiting conflicts of interest. (Op., R. 75, Page ID # 1058-59.) Plaintiffs do not explain any better than they did during the preliminary injunction stag, how such critical defects in their argument would survive "the more lenient motion to dismiss standard." Indeed, this Court's earlier decision effectively held that the eligibility criteria were constitutional—under either *Anderson-Burdick* or the

"unconstitutional conditions" doctrine. *Daunt*, 956 F.3d at 406-413. How, then, would Plaintiffs' claims not be subject to dismissal for failing to state a claim? Simply put, there is only so much a "more lenient standard" can do to save a claim from dismissal.

In short, the District Court did not misapply the standard of review for motions to dismiss, and, as demonstrated below, the District Court properly concluded that Plaintiffs failed to state claim that the eligibility criteria for Michigan's Commission violate the First Amendment.

A. The District Court did not err in applying the *Anderson-Burdick* framework to analyze the constitutionality of the eligibility criteria.

Plaintiffs argue that the District Court erred in applying the *Anderson-Burdick* framework because, they assert, this case does not concern election administration. Plaintiffs' argument misses the mark.

First, they fail to explain how the District Court could be in error by applying *Anderson-Burdick* when this Court—less than three months prior to the District Court's order—applied the *Anderson-Burdick* standard *to these same claims in this case*. *Daunt,* 956 F.3d at 406-409. And, it bears repeating in this context, this Court denied

rehearing *en banc*. Also, this Court's panel decision detailed the line of cases supporting the application of *Anderson-Burdick* in this case. *Id.* So, even if the District Court had agreed with Plaintiffs' argument and felt that *Anderson-Burdick* was not appropriate, it is entirely unclear how the District Court could have disregarded *Anderson-Burdick*. Regardless, the District Court expressly stated that it found this Court's analysis persuasive, so it follows that the District Court found this Court's application of *Anderson-Burdick* persuasive as well.

Next, the Plaintiffs incorrectly limit *Anderson-Burdick* to only cases specifically concerned with the "administration of elections." (Doc. 20, Appellants' Br., Page ID # 27.) But as the Panel noted, the underlying rationale espoused by the Supreme Court in *Burdick*—ensuring "the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system"—resonate just as much in the case at hand. *Daunt*, 956 F.3d at 406-407. The Supreme Court in *Burdick* described the test as applying when a court is "considering a challenge to a state election law" brought under the First and Fourteenth Amendments. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); s*ee also Anderson v. Celebrezze*, 460 U.S. 780

(1983). That is exactly the nature of the challenge raised by Plaintiffs here, so the application of *Anderson-Burdick* is appropriate in this case.

In their attempt to avoid the application of *Anderson-Burdick*, the Plaintiffs suggest that Michigan's constitutional amendment establishing the Commission concerns something other than "the voting process" or "the mechanics of the electoral process." (Doc. 20, Appellants' Br., Page ID # 41.) But this framing ignores the direct consequences of the Commission's work—the drawing of legislative districts that will control the candidates for whom voters may cast their vote, and how effective their votes may be. The Commission has no other function. It is entirely dedicated to this central component of administering an election. The eligibility criteria determining who may serve on that Commission, therefore, have a direct effect on the drawing of legislative districts and the administration of elections in those districts.

Regardless, the Plaintiffs' critique of the District Court's use—and, implicitly, this Court's use—of *Anderson-Burdick* disregards that neither the District Court nor this Court relied solely on that test to decide the preliminary injunction. Instead, both Courts reviewed the

Plaintiffs' challenge under both the *Anderson-Burdick* test and the "unconstitutional conditions" doctrine and found the amendment constitutional under both tests. *Daunt,* 956 F.3d at 413. As this Court expressly stated, it "need not choose between the two," and instead discussed why the amendment was constitutional under both tests. *Daunt,* 956 F.3d at 406. The District Court similarly considered Plaintiffs' claims under both tests and found the eligibility criteria constitutional. (Op, R. 75, Page ID # 1059.)

This Court used a similar approach in *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 920 (6th Cir. 1998), which involved a challenge to Michigan's adoption of term limits for state offices. There, as here, the issues of the case blended election laws with eligibility for public offices. This Court was nonetheless able to determine the constitutionality of the proposal under both *Anderson-Burdick* and the deferential approach used by the Ninth Circuit in *Bates v. Jones*, 131 F.3d 843, 858 (1997) ("*Bates II*").[8]

[8] This Court, holding that the deferential approach under *Bates II* had not been further developed in this circuit, did not consider that approach. If this Court now decides that the panel's consideration of both *Anderson-Burdick* and the unconstitutional conditions doctrine was insufficient, this Court should remand the case to the District

Thus, the District Court's decision—like this Court's decision before it—did not simply rely on *Anderson-Burdick* to reach its result, and instead also considered the same unconstitutional conditions doctrine upon which Plaintiffs continue to rely. (Doc. 20, Appellants' Br., Page ID # 34.) The Plaintiffs make no direct argument against this Court's prior holding on the use of the unconstitutional conditions analysis, under which the panel also concluded that the eligibility criteria were constitutional. *See Daunt*, 956 F.3d at 409-413.

Also, contrary to the Plaintiffs' arguments, the District Court's decision does not directly, or even indirectly, conflict with decisions from either the U.S. Supreme Court or this Court. The Plaintiffs refer to *McIntyre v. Ohio Election Commission*, 514 U.S. 334 (1995), which concerned a prohibition against anonymous distribution of campaign literature. But *McIntyre* offers no broad declaration of the scope of *Anderson-Burdick*. That case confronted a "direct regulation of the content of speech." *McIntyre*, 514 U.S. at 345. And in distinguishing that situation from the "ordinary litigation" of election cases, the

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Court for re-consideration of the Plaintiffs' arguments in the earlier briefs on the deferential approach.

Supreme Court noted that the specific statute at issue—Ohio Code § 3599.09(A)—did not "control the mechanics of the electoral process." *Id.* At best, *McIntyre* merely instructs that connection to a political campaign does not transform an otherwise straight-forward free-speech claim into an election case. But there is no "direct regulation of speech" at issue in the eligibility criteria for Michigan's Commission, and *McIntyre* offers little other guidance on the application of *Anderson-Burdick*. There is certainly no explicit proscription against the use of *Anderson-Burdick* in this situation that would constitute a direct conflict between the District Court's decision and the Supreme Court.

The Plaintiffs also cite to *Briggs v. Ohio Elections Commission*, 61 F.3d 487 (1995), but *Briggs* provides virtually no analysis on the scope of *Anderson-Burdick*. Instead, the only discussion of *Anderson-Burdick* occurs in a footnote and consists of a citation to *McIntyre* and a generic recitation that the *Anderson-Burdick* standard should not be applied to First Amendment challenges to regulations limiting the content of political speech, such as the campaign billboard at issue in that case. *Id.* at 493 n.5.

Finally, Plaintiffs contend that the District Court decision conflicts with this Court's unpublished decision in *Moncier v. Haslam*, 570 Fed. App'x 553 (6th Cir. 2014). But *Moncier*, 570 Fed. Appx. at 559-560, addressed only standing, and referred to *Anderson-Burdick* only for the point that neither case substantively supported the plaintiffs' First and Fourteenth Amendment claims in that case. While the Plaintiffs strain to find similarity to *Moncier* because "both involve selection of government employees without regulating the election of candidates," such a comparison misreads both the decision in *Moncier* and Michigan's redistricting amendment. Nonetheless, nothing in *Moncier* may be read as an analysis on the application of *Anderson-Burdick* to the composition of a redistricting commission like Michigan's. Accordingly, the District Court's decision cannot be said to be in conflict with decisions of this Court, as the Plaintiffs claim.

To the contrary, Michigan's Commission absolutely does regulate the mechanics of election administration. The Commission's work directly determines what candidates are available to voters, and thereby the content of their ballots. Redistricting is an essential process to holding an election and is effectively the first step that must

be taken before there can be an election. And the eligibility criteria for members of the Commission closely resemble candidate-qualification laws that have been reviewed by this Court under *Anderson-Burdick*. *See Citizens for Legislative Choice v. Miller*, 144 F.3d at 920. As a result, not only is the District Court's decision not in conflict with decisions of either the Supreme Court or this Court, but the District Court's use of *Anderson-Burdick* was consistent with this Court's prior decision in *Citizens for Legislative Choice*.

Last, the Plaintiffs' argument repeatedly refers to Judge Readler's separate opinion in *Daunt*, 956 F.3d at 422-431, in which he questioned the scope of *Anderson-Burdick* and raised concerns about its potential over-application or misuse. But Plaintiffs appear to overlook that Judge Readler delivered a *concurring* opinion—in which he agreed that Michigan's redistricting amendment was constitutional as an exercise of state sovereignty. *Daunt*, 956 F.3d at 431. The concurring opinion does not support Plaintiffs' conclusion that the same requirements that Judge Readler upheld are now unconstitutional.

B. Plaintiffs' arguments under the unconstitutional-conditions doctrine also fail to state a claim that the eligibility criteria violate the First Amendment.

Plaintiffs argue that the District Court failed to properly consider their arguments and "dismissed Appellants' unconstitutional-conditions claims with one sentence, relying exclusively on this Court's determination at the preliminary injunction stage." (Doc. 20, Appellants' Br., Page ID # 34.) But this argument ignores the extensive prior briefing in this case, in which these same claims and issues had already been raised. Indeed, as the District Court noted, "Neither the parties' arguments nor the record has changed in the interim." (Op., R. 75, Page ID # 1059.)

Similarly, this Court already considered and decided these same claims. *See Daunt*, 956 F.3d at 409-413. Plaintiffs fail to offer any explanation why this Court's earlier analysis is no longer applicable to the very same claims it previously considered. Instead, Plaintiffs spend much time arguing that the eligibility criteria exclude persons based on their protected speech and associations and are subject to heightened scrutiny. (Doc. 20, Appellants' Br., Page ID # 35-44.) Alternatively, Plaintiffs argue that the criteria are over-inclusive and under-inclusive

and fail to pass muster even under exacting scrutiny. (Doc. 20, Appellants' Br., Page ID # 44-57.)

But this Court previously acknowledged that "it is clear that at least some of the activities restricted by the eligibility criteria are protected by the First Amendment." *Daunt*, 956 F.3d at 410. However, "in light of the government's interest in avoiding partisan conflicts of interests and unsavory patronage practices, . . . the Supreme Court has repeatedly held that these types of restrictions do not run afoul of the First Amendment or Equal Protection Clauses." *Id.*

This Court then considered a string of Supreme Court cases upholding such restrictions. *Id.* (quoting *United Public Workers of America (C.I.O) v. Mitchell*, 330 U.S. 75 (1947); *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548 (1973); *Clements v. Fashing*, 457 U.S. 957 (1982)). This Court concluded that "*Mitchell, Letter Carriers,* and *Clements* squarely foreclose the present challenge to the Amendment's eligibility criteria." *Daunt*, 956 F.3d at 411. This Court further held that "we discern no constitutional limitation on Michigan making the forbearance from such

activity a condition of sitting on an independent redistricting commission." *Id.*

Plaintiffs argue now that these cases are distinguishable; but notably they failed to make such an argument in their brief opposing the motion to dismiss and made no mention of these three cases. (See Brf. Opp. MTD, R. 57, Page ID # 813-815.) So arguably Plaintiffs have not preserved this argument for appeal. In any event, as the District Court noted, this Court previously considered attempts to distinguish these cases and found them "unpersuasive." (Op., R. 75, Page ID # 1059) (quoting *Daunt*, 956 F.3d at 411.

Regardless, as this Court previously held, "[e]fforts to purge conflicts of interest from the democratic process 'have been commonplace for over 200 years'" and "we are loath to disturb this longstanding practice, particularly when 'public confidence in the integrity of the redistricting process' is at stake." *Daunt*, 956 F.3d at 411 (citing *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019)). Further, this Court recognized that the eligibility criteria, "do not represent some out-of-place addition to an unrelated state program; they are part and parcel of the definition of this Commission, of how it achieves

independence from partisan meddling." *Daunt*, 956 F.3d at 412. This, the Court held, "is critical to the constitutionality of a challenged program under the unconstitutional-conditions doctrine[.]" *Id.*

The eligibility criteria in article 4, § 6(1)(b) were designed "to squeeze every ounce of incumbent and legislative influence out of redistricting" by excluding persons who presently, or have within the last six years, participated in the political operation of Michigan government. *See, e.g.,* Bruce E. Cain, Redistricting Commission: A Better Political Buffer?, 121 Yale L. J. 1808, 1824 (2012) (discussing California's similar provisions after which Michigan's are modeled). Each of the individual Plaintiffs who are excluded here has or can reasonably be perceived as having a private interest in the outcome of any redistricting plan approved by the Commission. The provisions are thus aimed at preventing the selection of a commissioner with a conflict of interest or who can be perceived as having a conflict of interest. *Id.* at 1808 ("Independent citizen commissions are the culmination of a reform effort focused heavily on limiting the conflict of interest implicit in legislative control over redistricting"), 1817-1821 (discussing

legislative conflict of interest and intent of independent citizen commissions to increase separation from conflict of interest).

The concern over conflict and bias is why Commission members are required to perform their duties "in a manner that is impartial and reinforces public confidence" in the redistricting process. Mich. Const., Art. 4, § 6(10). And as state officers all commissioners must act in the best interests of the public since an officer cannot be in a position where private interests conflict with public duties or tempt the officer to act contrary to public interest. 63C Am. Jur. 2d, Public Officers and Employees, § 246. *See also People v Township Board of Overyssel*, 11 Mich. 222, 225 (Mich. 1863); 1863 WL 2386 ("All public officers . . . are trusted with public functions for the good of the public; to protect, advance and promote its interests, and not their own.").

The eligibility criteria are intended to avoid this scenario by excluding individuals whose private interests, based on their participation in the political machinery of the State, or their relationship to those who have participated, will conflict with their public duty to draw district lines in an impartial manner, free from undue political influence. The intent can be viewed as analogous to

ensuring selection of an impartial jury, which is aimed at ensuring impartiality. *See* Cain, 121 Yale L. J. at 1825; *see also* Mich. Ct. R. 2.511(D) (for cause jury challenges).

Here, each of the Plaintiffs has a conflict or may reasonably be perceived as having a conflict of interest based on the office or position he or she *currently* holds. *See, e.g.*, *Storer v. Brown*, 415 U.S. 724, 737 (1974) ("if a candidate is absolutely and validly barred from the ballot by one provision of the laws, he cannot challenge other provisions as applied to other candidates"); *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484-85 (1989) ("[I]t is not the usual judicial practice . . . nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied.").

Declared candidate for partisan office

Plaintiff Aaron Beauchine was a Republican candidate for a local county commission office in March 2018. (Compl., R. 1, ¶9, Page ID # 5; Mot. for P.I., R. 4-3, Beauchine Dec., ¶5, Page ID # 117.) Certainly, current candidates for a partisan local, state, or federal office are properly excluded from the Commission since they would have an

interest in drawing district lines that would or could affect their own candidacies, or in drawing lines favorable or unfavorable to other candidates or legislators in an effort to advance their own interests. Even failed partisan candidates like Beauchine pose similar conflict concerns because he could have, or could be perceived as having, an interest in drawing lines that could benefit a future candidacy, his own or even another candidate's in the party.

Elected official to partisan office

Plaintiff Tom Barrett was elected as a Republican to the Michigan Senate in November 2018, and his term of office began January 1, 2019. (Compl., R. 1, ¶8, Page ID # 5; Mot. for P.I., R. 4-3, Barrett Dec., ¶5, Page ID # 114.) It could hardly be disputed that Senator Barrett would have a personal interest in how his districts are redrawn in 2021, and in how the districts of their Republican colleagues, or their Democratic colleagues for that matter, will be redrawn.[9]

[9] Their exclusion from the Commission is not only consistent with, but may be required by, article 4, § 9, which prohibits sitting legislators from receiving "any civil appointment within this state," other than a notary public, while serving in office. Mich. Const. 1963, art. 4, § 9. *See also* Mich. Const. 1963, art. 4, § 8 ("No person holding any office . . . or position under . . . this state . . . may be a member of either house of the legislature").

Several Plaintiffs serve as elected Republican precinct delegates: Plaintiff Linda Tarver, (Compl., ¶14, Page ID # 6), Plaintiff Mary Shinkle, (*id.*, ¶17, Page ID # 7), Plaintiff Norm Shinkle, (*id.*, ¶18, Page ID # 7), and Plaintiff Clint Tarver, (*id.*, ¶21, Page ID # 8; Mot. for P.I., R. 4-3, C. Tarver Dec., ¶5, Page ID # 153). Precinct delegates are elected at party primaries on a party basis at the precinct level. Mich. Comp. Laws, §§ 168.623a, 168.624. Precinct delegates vote at party conventions and assist their party by functioning as a conduit between local party members and the state parties by helping to recruit new members, elect party candidates, and ensure turnout at elections, among other duties.[10] As local party activists, precinct delegates certainly have an interest in how lines are drawn for the elected officials and candidates they support or will support in the future.

Officer of a national, state, or local political party

Plaintiff Anthony Daunt has served as an officer and member of the Clinton County Republican Party since 2017. (Compl., R. 1, ¶7,

[10] *See* Bridge Magazine, April 2018, https://www.bridgemi.com/michigan-government/fight-soul-michigan-gop-waged-precinct-precinct, (discussing significance of precinct delegates).

Page ID # 5; Mot. for P.I., R. 4-3, Daunt Dec., ¶5, Page ID # 111.) Since April 2017, Plaintiff Daunt has also served as a member of the governing body of the Michigan Republican Party Committee. *Id.* Plaintiff Kathy Berden has served as the national committeewoman of the Republican Party since 2016. (*Id.*, ¶10, Page ID # 5; R.4-3, Berden Dec., ¶5, Page ID # 120.) Plaintiff Gerry Hildenbrand has been a member of a governing body of a national, state, or local political party since 2017. (*Id.*, ¶12, Page ID # 6; R. 4-3, Hildenbrand Dec., ¶5, Page ID # 126.) Plaintiff Linda Tarver serves as President of the Republican Women's Federation of Michigan, which is a voting member of the Michigan Republican Party's State Central Committee. (*Id.*, ¶14, Page ID # 6; R. 4-3, L. Tarver Dec., ¶5, Page ID # 132.) Plaintiff Marian Sheridan has been the Grassroots Vice Chair of the Michigan Republican Party since February 2019. (*Id.*, ¶16, 19 Page ID # 6, 7-8; R. 4-3, M. Sheridan Dec., ¶5, Page ID # 138.) Plaintiff Mary Shinkle has served as the Vice Chair of the Ingham County Republican Party since November 2018. (*Id.*, ¶17, Page ID # 7; R. 4-3, M. Shinkle Dec., ¶5, Page ID # 141.) And Plaintiff Norm Shinkle has been an officer or

member of a governing body of a state political party since February 2017. (*Id.*, ¶18, Page ID # 7; R. 4-3, N. Shinkle Dec., ¶5, Page ID # 144.)

Consultant or employee of elected officials, candidates, campaigns, or political action committees

Plaintiff Gary Koutsoubos has been a consultant to a candidate(s) for a federal, state, or local office or a political action committee since July 8, 2017. (Compl., R. 1, ¶13, Page ID # 6; Mot. for P.I., R. 4-3, Koutsoubos Dec., ¶5, Page ID # 129.) Plaintiff Patrick Meyers has been a paid consultant to candidate(s) for federal, state, or local office or a political action committee since 2010. (*Id.*, ¶15, Page ID # 6; R. 4-3, Meyers Dec., ¶5, Page ID #1 35.)[11]

Employees and consultants for partisan elected officials have a personal interest in lines being drawn that benefit their partisan employers. Even former employees and consultants may have a residual interest in the employer's district with respect to maintaining connections or forging future connections in the district. And regardless, former employees and consultants raise conflict of interest

[11] These Plaintiffs declined to identify which officials, candidates, or political action committees they were paid to consult with.

concerns simply because of their status as former employees and consultants of partisan officials.

Work for nonpartisan elected officials and candidates raises conflict issues as well. Again, the purpose of the eligibility criteria is to separate the Commission and its members from *political* influence, not simply *partisan* influence. Nonpartisan officials and candidates can be as entrenched in the political machinery of government as much as any partisan, and thus have personal interests in who is elected in a particular district and therefore how it is drawn. As a result, working or consulting for these individuals raises the same concerns as it does with respect to the partisan officials discussed above.

Employee of the Legislature

Plaintiff Stephen Daunt is an employee of the Michigan Legislature and has been since January 1, 1991. (Compl., R. 1, ¶11, Page ID # 6; Mot. for P.I., R. 4-3, S. Daunt, ¶5, Page ID # 123.) Upon information and belief, Plaintiff Daunt presently works for the Michigan House Republican policy office. Certainly, as a current legislative employee who works in a partisan capacity, he has an interest in how his party's legislative districts are redrawn.

Registered lobbyist agent

Plaintiff Anthony Daunt is a registered lobbyist agent in the State of Michigan. (Compl., R. 1, ¶7, Page ID # 5; Mot. for P.I., R. 4-3, Daunt Dec., ¶5, Page ID # 111.) Plaintiff Daunt is a lobbyist for the Michigan Freedom Fund.[12] According to its website, the Michigan Freedom Fund is a nonprofit organization that creates educational initiatives, promotes issue advocacy, and supports policies that protect citizens' constitutional rights.[13] As the Fund's lobbyist, Plaintiff Daunt seeks to influence the legislative or administrative actions of public officials, including legislators, in order to promote the interests of the Fund. *See* Mich. Comp. Laws, §§ 4.412(1), 4.415(1)-(3). Lobbyists like Plaintiff Daunt are active participants in the political process and their personal and financial success depends on forging relationships and currying favor with state and federal legislators on behalf of their special-interest clients. This means Plaintiff Daunt has an interest in who is

[12] Plaintiff Daunt's lobby registration information is available on the Secretary of State's website at https://miboecfr.nictusa.com/cgi-bin/cfr/lobby_detail.cgi?caller%3DSRCHRES%26last_match%3D50%26lobby_type%3D%2A%26lobby_name%3DDAUNT%26include%3Dactive%261%3D1%26lobby_id%3D12493%26last_match%3D0.

[13] See Michigan Freedom Fund, Our Mission tab, available at https://www.michiganfreedomfund.com/our-mission.

elected to the Legislature and Congress—which of course, is impacted by how district lines are drawn. This private interest conflicts with the public duty of a Commissioner to draw fair and impartial lines.

State employee exempt from classification

Plaintiff Koutsoubos was also an unclassified state employee between March 2014 and June 2017. (Compl., R. 1, ¶13, Page ID # 6; Mot. for P.I., R. 4-3, Koutsoubos Dec., ¶5, Page ID # 129.) Under Michigan's Constitution, the head of a principal department may employ up to five individuals in "policy-making" positions that are exempt from civil service. Mich. Const. 1963, art. 11, § 5. Plaintiff Koutsoubos was appointed by former Republican Secretary of State Ruth Johnson as an executive office representative and later appointed to the unclassified position of Director of the Office of External Affairs.[14] Plaintiff Koutsoubos's participation in state government as a high-level policymaker for a partisan elected state official raises the same conflict-of-interest concerns discussed above.

[14] The press release is available at https://www.michigan.gov/sos/0,4670,7-127--298666--s,00.html.

Family member of disqualified individual

Plaintiff Paul Sheridan is the son of Plaintiff Marian Sheridan. (Compl., R. 1, ¶19, Page ID # 7-8; Mot. for P.I., R. 4-3, P. Sheridan Dec., ¶5, Page ID # 147.) Plaintiff Bridget Beard is the daughter of Plaintiff Marian Sheridan. (*Id.*, R. 1, ¶20, Page ID # 8; R. 4-3, Beard Dec., ¶5, Page ID # 150.) Marian Sheridan is the Grassroots Vice Chair of the Michigan Republican Party. (Mot. for P.I., R. 4-3, M. Sheridan Dec., ¶5, Page ID # 138.)[15] As discussed above, Ms. Sheridan's status as a party leader presents a conflict because her private interests in the success of the party conflicts with the public duty of a commissioner to draw lines without consideration of who or which party will benefit from the lines drawn. Her Plaintiff children are conflicted because of their status as immediate family members. It is not unreasonable to think that Paul and Bridget, if chosen as Commissioners, would be inclined to perform their public duties in a way beneficial to the interests of their mother.

[15] According to the Michigan Republican Party website, Ms. Sheridan organizes grassroots events in order to spread the Republican message, grow the party, and recruit precinct delegates. See Michigan Republicans, Party Leadership tab, available at https://www.migop.org/about.

Even if that were not true, their presence on the Commission would raise the appearance of a conflict of interest.

As demonstrated above, each individual Plaintiff in this case is exactly who the people of Michigan intended to exclude given their activities and relationships and their concomitant conflicts of interest.

In contrast, the burdens imposed on Plaintiffs are—as this Court previously held—"relatively insignificant." *Daunt,* 956 F.3d at 409. Any burden on each Plaintiffs' speech and association rights resulting from the eligibility criteria is minimal at best. Plaintiffs do not have a right to be a member of the Commission any more than they do any other commission or board created by the Michigan Constitution. *See, e.g.*, *Snowden v. Hughes,* 321 U.S. 1, 6-7 (1944) (no fundamental right to public employment); *Bullock v. Carter,* 405 U.S. 134, 142-43 (1972) (no "fundamental right to run for elective office"); *Moncier*, 570 F. Appx at 559 (finding no federally protected interest in being candidate for state-court judge). Notably, the Michigan Constitution already limits political affiliation on certain of these entities by limiting the number of appointments of persons associated with a political party. *See* Mich. Const 1963, art. 2, § 7 (Board of State Canvassers); art. 5, § 28 (State

Transportation Commission); art. 5, § 29 (Civil Rights Commission); art. 11, § 5 (Civil Service Commission).

Article 4, § 6 expressly requires that 8 of the 13 Commissioners be affiliated with a major political party—four members each of the Republican Party and the Democratic Party. Plaintiffs, as persons who affiliate with the Michigan Republican Party, are eligible based on their affiliation to apply for the four Republican seats. But they cannot do so for this redistricting cycle—*not* because of their political affiliation, but because they have, or can reasonably be perceived as having, a conflict of interest given their present status, *e.g.*, partisan elected official or candidate, political party officer, daughter, *etc.* But Plaintiffs could be eligible for the next redistricting cycle. Indeed, they have approximately four years (given the six-year look back) in which to act to ensure their eligibility to apply for the next Commission.

For some Plaintiffs, this may mean declining to run for an office, or resigning from an office or position so they are eligible to apply for the Commission. But these are the kinds of decisions people often make in deciding to run for an office or seek an appointment to an office. There is a burden in making such decisions, but it certainly is not

severe. *Daunt,* 956 F.3d at 408 (citing *Clements*, 457 U.S. 957) (upholding provision rendering ineligible certain persons from election or appointment to state legislature) and *Grizzle v. Kemp*, 634 F.3d 1314 (11th Cir. 2011) (reiterating that "the existence of barriers to a candidate's access to the ballot" requires only rational-basis review, not strict scrutiny).[16]

Because the eligibility criteria are critical to the State's compelling interests in avoiding partisanship—or the appearance of partisanship—and self-interest from the Commission, and because there is no significant burden imposed on the Plaintiffs, the requirements survive under any standard of review. Plaintiffs' First Amendment challenge must fail, and the District Court properly dismissed the claim.

II. Plaintiffs failed to state a claim that the eligibility criteria violate equal protection principles, and the District Court properly dismissed that claim.

The Plaintiffs argue that the eligibility criteria violate their equal protection rights. (Doc. 20, Appellants' Br., Page ID # 58-60.)

[16] While this portion of the *Daunt* analysis considered the *Anderson-Burdick* sliding scale framework, Plaintiffs offer no explanation for why the burden would be considered more harsh under their unconstitutional-conditions standard than it would be under *Anderson-Burdick*.

"To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis." *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (internal quotation marks omitted). Plaintiffs must show that the government has "treat[ed] differently persons *who are in all relevant respects alike*." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added); *see also Jolivette v. Husted*, 694 F.3d 760, 771 (6th Cir. 2012) ("[The plaintiff's] equal-protection claims do not get off the ground because independent candidates and partisan candidates are not similarly situated for purposes of election regulations.").

Plaintiffs generally complain that they are being treated differently from those who choose not to exercise their rights of speech or association. (Doc. 20, Appellants' Br., Page ID # 60.) They also complain that registered lobbyists are treated differently than unregistered lobbyists, and that paid consultants and employees are treated differently than volunteers. (Doc. 20, Appellants' Br., Page ID # 59). But Plaintiffs do not explain how they are similarly situated in all

relevant respects to those individuals. Indeed, they are not. Thus, their equal protection claims do not even get off the ground. *See Jolivette*, 694 F.3d at 771.

Regardless, the eligibility criteria are constitutional. The *Anderson-Burdick* balancing test also applies to equal protection claims. *Obama v. Hust*, 697 F.3d. at 423 (2012). Thus, similar to the rational basis test, where a regulation imposes only a minimal burden, the State's important regulatory interests are generally sufficient to justify the restriction. *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 335 (6th Cir., 2016).

As discussed above, Plaintiffs' First Amendment rights are not severely burdened. And any burden is sufficiently outweighed by the State's interest. The manifest purpose of the amendment is to transfer the power of establishing legislative districts from the Legislature and the political parties who dominate it to the hands of citizens without a personal stake in the details of how and where those districts are drawn. Its passage was a reflection of popular frustration at the manipulation of those districts by the legislators who would then campaign to fill them. Partisan elected officials, candidates, lobbyists,

consultants, and party officials constitute the political apparatus that created the circumstances that gave rise to the amendment in the first place. Allowing them to now become members of the Commission would contradict the very purpose of the amendment. The government has an important interest in protecting the legitimacy of the people's chosen redistricting system. This interest sufficiently supports Plaintiffs' exclusion from the Commission.

Similarly, as discussed above, there is a legitimate reason to exclude certain close family relations of otherwise excluded persons. Art. 4, § 6(1)(c). These relations can be presumed to have a financial or other interest in the outcome of the redistricting plans on behalf of their parents, children, or spouses. Again, this is akin to other kinds of anti-nepotism statutes and restrictions. *See, e.g*, Mich. Comp. Laws § 432.31 (lottery ticket "shall not be purchased by and a prize shall not be paid to . . . any spouse, child, brother, sister or parent residing as a member of the same household in the principal place of abode of an officer or employee"); Mich. Ct. R. 2.511(D)(8) (jurors related within "the ninth degree of consanguinity or affinity to one of the parties or attorneys" are removable for cause).

Such anti-nepotism restrictions have been repeatedly upheld against equal protection challenges. This Court has observed that "virtually every court to confront a challenge to an anti-nepotism policy on First Amendment, substantive due process, equal protection, or other grounds has applied rational basis scrutiny." *Montgomery,* 101 F.3d at 1126. And the Michigan Supreme Court has noted that the validity of anti-nepotism and no-spouse policies "ha[ve] been consistently sustained when challenged under Title VII of the Civil Rights Act of 1964." *Miller v. C.A. Muer Corp,* 362 N.W.2d 650, 653 (Mich. 1984) (citations omitted). It would be very curious if anti-nepotism restrictions that are virtually identical to those that have previously been upheld under Title VII were held to violate equal protection concerns in this case.

Plaintiffs claim that because the amendment burdens their fundamental rights, strict scrutiny should apply. (Doc. 20, Appellants' Br., Page ID # 41-44.) But again, under *Anderson-Burdick* review there is no severe burden on any fundamental right under the First Amendment, and the minimal burden imposed by the eligibility criteria is outweighed by the State's legitimate—indeed compelling—interest in

determining who will perform redistricting. Thus, even if strict scrutiny were to apply in lieu of *Anderson-Burdick* or the "deferential approach" the amendment would still survive review.

According to Plaintiffs, the amendment must be "narrowly tailored to legitimate government objectives." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972). Here, the objectives of the amendment are to create a decision-making body that is independent of the partisan political structure of the State's political parties and special interests. So, the question becomes whether the eligibility criteria are narrowly drawn to achieve that aim. Again, Plaintiffs' exclusion is not based upon their chosen party affiliation; it is instead premised on their real or apparent conflicts of interest in the outcome of the decisions the Commission will be required to make.

And the amendment is narrowly drawn because it limits its categorical exclusions to only those with a real or potential conflict of interest based upon their being a partisan office holder, candidate, party official, lobbyist, or paid political consultant or employee, or those who are children, step-children, parents, step-parents, or spouses to someone who falls in one of those categories. It does not apply to an

overly broad group of relatives, only those who are very close or even in the same household. Nor does it bar them from all governmental office-holding, only temporarily from this one Commission that exists for a short period of time every ten years. The amendment excludes only as many people as necessary to prevent those with a conflict of interest from being on the Commission, and so it is narrowly drawn to further its compelling objectives. The eligibility criteria do not violate equal protection.

III. Any unconstitutional eligibility criteria may be severed from the rest of the amendment.

"Severability is of course a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). The Plaintiffs argue that if any of the eligibility requirements are found unconstitutional, the entire amendment must be struck because the provisions are not severable. But their argument against severability rests on an analysis of *statutory* interpretation and the supposed inability to divine what the voters intended regarding severability. (Doc. 20, Appellants' Br., Page ID # 61-66.) This argument misses the amendment's *express* inclusion of a severability clause, which provides that if a court finds "*any part*" of

the amendment unconstitutional the "provision held invalid is severable from the remaining portions of this section." Mich. Const. 1963, art. 4, § 6(20). The severability clause's plain language manifests the voters' intent to retain the amendment even if some portion were found unconstitutional. *Citizens Protecting Michigan's Constitution,* 921 N.W.2d at 253 (holding that courts interpret Michigan's Constitution according to "the text's original meaning to the ratifiers, the people, at the time of ratification," and that the primary rule is that of "common understanding"). Here, the language of the amendment as to severability is plain, its meaning is clear, and no further inquiry into the voter's intent is necessary or required.

But, without observing any difference between a statute and a constitutional amendment, the Plaintiffs proceed to consider how severability might apply if the amendment was, instead, a statute. (Doc. 20, Appellants' Br., Page ID # 60.) Notably, Michigan's statutory severability is rooted in its own statute, which is what calls for consideration of whether it would be consistent with the intent of the legislature, and its language is different than what is written in this amendment. Mich. Comp. Laws § 8.5. By relying on § 8.5 as its

structure for a severability analysis, Plaintiffs' argument misapplies state precedent and is inconsistent with prior holdings of the Michigan Supreme Court. *See In re Apportionment of State Legislature*, 321 N.W.2d 565 (Mich. 1982) ("This Court will not apply case law developed in the resolution of controversies concerning statutory invalidity where the issue presented concerns constitutional invalidity."

Moreover, even if the statutory severability provisions could be applied, it would hardly compel the conclusion that the amendment is ineligible for severance. In *Midland Cogeneration Venture L.P. v. Naftaly*, 803 N.W.2d 674, 682 (Mich. 2011), the Michigan Supreme Court held that, in order to determine whether severance is appropriate, the court must consider whether the statute remaining after severing the offending provision, "is capable of functioning[.]" Each of the eligibility provisions at issue here are sufficiently discrete requirements such that each could, if necessary, be struck from the amendment, leaving the remaining provisions of art. 4, § 6 operable and in effect. The cases the Plaintiffs rely upon are clearly distinguishable, in that each of them found that the enactments were incapable of operating without the severed language. *In re Apportionment of State*

Legislature, 321 N.W.2d at 588-581; *Lucas v. Forty-Fourth General Assembly,* 377 U.S 713, 735 (1964) (finding amendment unworkable without the stricken provision and holding there was "no indication" that the provisions were severable); *Randall v. Sorrell*, 548 U.S. 230 (2006) (holding state statute could not effectively function without the offending provisions). In contrast to those cases, the eligibility criteria here are not so interconnected to each other or to the remainder of § 6 that the Commission could not be appointed and perform its redistricting function without them.

Additionally, in arguing that severability is not possible, the Plaintiffs appear to suggest that the eligibility criteria are "so essential" as to cast doubt on the operation of the amendment as a whole. (Doc. 20, Appellants' Br., Page ID # 67.) This undermines their constitutional arguments that the exclusions are not narrowly drawn. The Plaintiffs' argument that the eligibility provisions cannot be severed is without merit.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Defendant-Appellee Michigan Secretary of State Jocelyn Benson respectfully requests that this

Honorable Court affirm the opinion and order of the District Court dismissing the Plaintiffs' complaint.

Respectfully submitted,

Dana Nessel
Michigan Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General

s/Erik A. Grill
Erik A. Grill (P64713)
Heather S. Meingast (P55439)
Assistant Attorneys General
Attorneys for Defendant-Appellee Benson
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: grille@michigan.gov
Email: meingasth@michigan.gov

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 13,000 words. This document contains 10,435 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Century Schoolbook.

s/Erik A. Grill

Erik A. Grill (P64713)
Assistant Attorney General
Attorney for Defendant-Appellee
Benson
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: grille@michigan.gov

CERTIFICATE OF SERVICE

I certify that on January 11, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

s/Erik A. Grill
Erik A. Grill (P64713)
Assistant Attorney General
Attorney for Defendant-Appellee
Benson
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: grille@michigan.gov

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendant-Appellee Benson, per Sixth Circuit Rule 28(a), 28(a)(1)-(2), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No. Range
Complaint for Declaratory & Injunctive Relief	07/30/2019	R. 1	1-49
Plaintiffs' Motion for Preliminary Injunction	07/30/2019	R. 4	53-92
Appendix A	07/30/2019	R. 4-1	93-99
Appendix B	07/30/2019	R. 4-2	100-109
Declaration of Anthony Daunt	07/30/2019	R. 4-3	110-154
Proposed Intervenor-Defendant's Motion for Leave to Intervene	08/12/2019	R. 11	167-169
Opinion & Order	08/28/2019	R. 23	262-265
Defendant Secretary of State's Motion to Consolidate	09/11/2019	R. 27	314-319
Order	09/11/2019	R. 30	333-335
VNP's Motion to Dismiss	09/19/2019	R. 37	479-483
Defendant Secretary of State's Response in	09/19/2019	R. 39	523-586

Opposition to Motion Preliminary Injunction			
Defendant Benson's Motion to Dismiss	09/19/2019	R. 42	591-596
Plaintiffs' Memorandum in Opposition to Motions to Dismiss	10/03/2019	R. 57	810-846
Opinion	11/25/2019	R. 67	926-971
Plaintiffs' Notice of Interlocutory Appeal	11/26/2019	R. 69	974-976
Opinion & Order	07/06/2020	R. 75	1036-1069
Plaintiffs' Notice of Appeal	08/02/2020	R. 77	1071-1073